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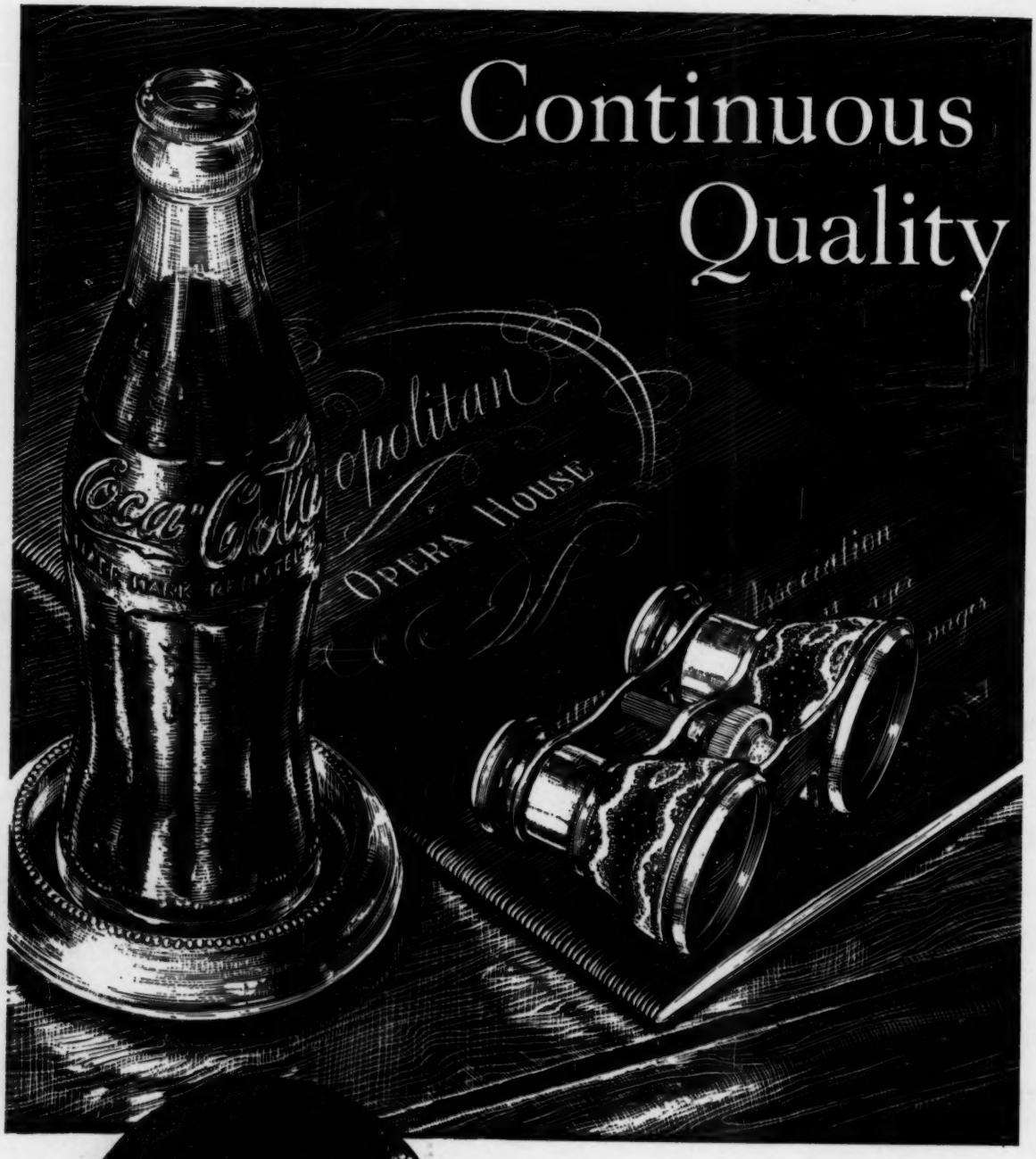

Ask for it either way . . . both trade-marks mean the same thing.

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JANUARY, 1950

In This Issue

Robert P. Patterson Analyzes the Cold War

Members of the Section of Corporation, Banking and Business Law who attended the Annual Meeting had the privilege of hearing former Secretary of War Robert P. Patterson's reasoned, terse explanation of United States policy toward the Soviet Union in the current diplomatic hostilities with our wartime ally. Declaring that critics of the Yalta and Potsdam agreements have overlooked the circumstances under which they were made, he compares American foreign policy since the war with that of Aristides, whose gentleness and consideration toward the allies took away the leadership of the harsh Spartans. (Page 1.)

Harold R. McKinnon Asks, Are We Against Communism?

Anyone who answers, "Of course", to the question, "Are we really opposed to Communism?" will find this article by Harold R. McKinnon disturbing. It raises a fundamental question about our present fight against Communist infiltration, and marshals evidence that tends to show that perhaps we are more opposed to Soviet military power than to Communism itself. His analysis of the problem of collectivism is brilliant, and his solution deserves the careful consideration of every American. (Page 5.)

Ambassador Jessup Describes Goal of International Law

The purpose of this paper read before a joint luncheon of the Junior Bar Conference and the Section of International and Comparative Law during the St. Louis meeting was neither to attack nor defend the Universal Declaration of Human Rights. Ambassador Jessup rather chose to examine the Declaration and the Conventions and Covenants proposed to implement it from the broader point of view of building a world order of international peace and security. His words are not a discussion of foreign policy or of international law, but rather a statement of what the American people can hope to achieve through their foreign policy and through international law. Idealistic without being impractical, Mr. Jessup's remarks help to bring the problems facing the world into focus. (Page 9.)

Louis G. Caldwell Replies to Mr. Schweppe

In the July, 1949, issue of the JOURNAL (35 A.B.A.J. 533) Alfred J. Schweppe of the Seattle Bar detailed the case for the opponents of the proposed administrative court. Mr. Caldwell presents the side for the proponents of the legislation in this able article. While conceding that the proposal, contained in bills introduced by Senator Pat McCarran and Representative Emanuel Celler, is no panacea, he argues that it is a long-needed step toward simplification of the maze of administrative tribunals. Taken with Mr. Schweppe's competent exposition, the two articles present as fine a summation of the arguments for and against the proposed administrative court as we have read. (Page 13.)

Louis L. Roberts Proposes Law Education Reform

The medical student is required to spend long hours in hospital wards, learning the techniques of his profession under the careful supervision of fine surgeons and physicians; the chemist's education includes months of work in the laboratory. Mr. Roberts points out that the lawyer just out of law school has had no training at all that prepares him to obtain the necessary information from his clients, or to file complaints and pleadings, or to draft legal instruments. Saying frankly that the lawyer must gain this knowledge at his clients' expense, he suggests a means of eliminating this unsatisfactory result. (Page 17.)

The National Labor Relations Board Versus the State Labor Boards

Jurisdictional conflicts in the field of labor relations are not confined to clashes between rival labor unions. The operation of the national labor statutes and various state statutes frequently give rise to a conflict between national and state jurisdictions. In such a conflict, the National Labor Relations Board is almost always victorious, but it is often quite difficult to determine whether the state board has the authority to act or not. David L. Benetar of New York discusses this problem and proposes a solution for it that should meet little opposition from either labor or management. (Page 27.)

English Legal Aid Plan Machinery Is Reported

Robert D. Abrahams of the Pennsylvania Bar, writing for the Survey of the Legal Profession, describes the machinery that is being set up by the Law Society to administer the English Legal Assistance Plan. Mr. Abrahams talked with the leaders of the English Bar and he summarizes his impression of the attitude of lawyers in England toward the Plan. He notes that the Plan has great significance for the profession in the United States, since there will certainly be agitation for similar legislation in this country once the Plan is in operation in the United Kingdom. (Page 31.)

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of 1950 Essay Contest Conducted by

AMERICAN BAR ASSOCIATION

Pursuant to terms of bequest of Judge Erskine M. Ross, Deceased.

INFORMATION FOR CONTESTANTS

Time When Essay Must Be Submitted:
On or before April 1, 1950.

Amount of Prize:
Twenty-five Hundred Dollars.

Subject To Be Discussed: "The Use of Injunctions in Labor Disputes"

Eligibility:

The contest will be open to all members of the Association in good standing, including new members *elected* prior to March 1, 1950 (except previous winners, members of the Board of Governors, Officers and employees of the Association), who have paid their annual dues to the Association for the current fiscal year in which the essay is to be submitted.

No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted.

An essay shall be restricted to five thousand words, including quoted matter and citations in the text. Footnotes or notes following the essay will not be included in the computation of the number of words, but excessive documentation in notes may be penalized by the judges of the contest. Clearness and brevity of expression and absence of iteration or undue prolixity will be taken into favorable consideration.

Anyone wishing to enter the contest should communicate promptly with the Executive Secretary of the Association, who will furnish further information and instructions.

AMERICAN BAR ASSOCIATION

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The Cold War:

Equity and Wise Policy as the Path to Peace

by Robert P. Patterson • former Secretary of War

■ Plutarch relates how Aristides brought peace to Greece by his courteous and conciliatory treatment of the allied states, in contrast to the harshness of the Spartan captains. Former Secretary Patterson recalls this incident in his discussion of American foreign policy following V-J Day. Taken from an address delivered to the Section of Corporation, Banking and Business Law during the Annual Meeting in St. Louis, Mr. Patterson's analysis of the cold war is tempered and logical, and, without prediction, he tells why he thinks that the chances for world peace are good.

■ Four years ago the Japanese went through with their formal ceremony of surrender to General MacArthur on the battleship *Missouri*. World War II became a topic for the pages of history. The clamor to bring the boys home next week was heard all over the land.

In the four years since that surrender, we hear it said, we have had no peace but only a "cold war". Someone (I believe it was Herbert Swope) coined the expression and it caught on, much the same as "war of nerves" won its way into circulation in the 1930s.

If the question were put to us to be answered under oath and to be answered in one word, whether we had had peace or war in the practical sense from 1945 down to the date of these presents, we would have no choice but to say we had had peace. In these years we have not known the incidents we associate with war. We have been spared the mobilization, the casualty lists, the waste of treasure, the risks that invariably attend the fortunes of war right down to the act of final submission. If peace and war are mutually exclusive—you have either the one or the other—no one can gainsay the fact that we have had four years of peace.

This answer requires the footnote, if you will, that it does not take into account that definitive treaties of peace have not been signed, sealed and delivered with Germany and Japan. In the American Revolution two years elapsed between the surrender at Yorktown and the Treaty of Paris; yet for practical purposes the Yorktown surrender was the end of the war. In the Civil War there was a space of ten years between Appomattox and complete resumption of normal relations between the seceded states and the Federal Government; but everyone knew that peace had come with Appomattox. This is the end of the footnote.

Cold War Sums Up Russian Behavior

Having said this much as to the existence of peace, we must acknowledge that the inventor of the phrase "cold war" had his wits about him. Like the earlier "war of nerves", it is an apt term to describe the state of tension that has grown tighter and tighter between nations. It is a concise summing up of the aggressive and provocative behavior of Soviet Russia.

It is safe to say that four years ago most Americans did not expect unfriendly behavior on the part of Soviet Russia to develop, or at least they did not expect it to come so soon. The stock of good will for the Russians was higher than ever before. We had been deeply moved by the heroic fighting done by the Red Army against the common enemy and by the suffering endured by the Russian people. We had been impressed by the speeches of the Russian leaders for united effort by the great powers for preservation of peace after the war. We had been impressed, too, by their apparent withdrawal of the support they had formerly extended to subversive forces here. On the future treatment of defeated Germany we were prepared to recognize that our own ideas might be motivated by "the spirit of chivalry peculiar to citizens of uninvaded countries"; in other words, that the Russian policy of greater severity was understandable.

We counted, too, and perhaps

most of all, on Russia's signature to the United Nations Charter. In the Charter was the plain pledge by all signing nations to take effective collective measures for removal of threats to the peace and for suppression of acts of aggression. True, the veto power was reserved, but the same chapter that reserved the veto contained the engagement that the members would act in conformity with the purposes and principles of the Charter. It was no more than reasonable to count on the veto not being used to frustrate the taking of collective measures for removal of threats to the peace. So the presence of the veto did not disturb us unduly; in fact, we must admit, if we look back to our state of mind in 1945, that we ourselves as well as the British and the Russians insisted on retention of the veto.

We have no way of knowing whether the Moscow representatives at the San Francisco Conference had their tongues in their cheeks when they signed the Charter. However, that may be, there was visible proof within a matter of months that Moscow was not going to cooperate in endeavors to remove threats to the peace or to go along with efforts to promote recovery from the impoverishment of war. It also became evident that Moscow was determined to impose her rule on her neighbors, never mind the terms of the promises given.

Russian Course Resembles Hitler's

The record is a long one and a dreary one—seizure of the free countries of Eastern Europe; fomenting open war against free Greece; paralysis in Germany; subversive movements in France and Italy; division of Korea; threats and menaces against Yugoslavia. There is one crisis after another. As soon as the violent blockade of Berlin is over, there is the sweep across China. Now there is the pressure on Yugoslavia, with the warning to Tito that his head is to be the forfeit. The frenzied cries coming out of Moscow against Tito at present are ominously reminiscent of the shrill threats of Hitler against the Poles ten years ago.

In the case of Yugoslavia there seem to be doctrinal differences with Moscow that can be comprehended only on the higher levels of Marxism. The main hinge of the business, however, is that Tito thwarted the efforts of the Russian secret police to take over management of affairs in Yugoslavia.

While these events were unfolding, the world heard strange twists given to familiar words—"democracy" to cover dictatorship, "peace-loving" to mean aggression, "freedom" to embrace the lack of it. We heard reasoning of the kind that Lincoln referred to, an arrangement of words to prove that a horse chestnut was a chestnut horse.

The record, long and dismal, is there as plain proof that the Soviet dictatorship (I do not say the Russian people, for their opinions are unknown and do not matter) is firmly bound to the purpose of obstructing peace and of thwarting recovery. Behind that purpose is the persistent, undeviating Communist creed of world revolution under leadership of Moscow. It has not changed and is not likely to change. So long as it persists, mutual trust among nations can be nothing more than a faint echo.

Russian Veto Forces U. S. To Take Action

These discouraging developments have not shaken our support of United Nations. They do force the conclusion on us, however, that for the time being United Nations is without power to give any solid assurance of collective action against war. The monotonous veto of Soviet Russia is there as a ball and chain. In consequence, recourse has been had to measures outside United Nations, though thoroughly consistent with the objectives of United Nations.

Our aid to Greece saved the Greeks from military conquest and loss of independence. The war there has not been a civil war. The guerrilla forces could not have kept up the fight without the weapons, rations, refuge and recruits provided by the three Soviet satellites on the northern frontier. Now that Yugoslavia has withdrawn support, the war is collapsing.

Aid to the people of Western Europe by the Marshall Plan has saved them from economic collapse. It is true that progress in the way of reduction of trade barriers and in currency control has been slower than we had a right to expect. We do not yet know how Europe will pay for the goods needed from the dollar countries. Nevertheless, the program has been a success. Smoke is again coming from factory smokestacks. There are no longer the crowds on the railroad trains, going out to the country to trade a watch or a pair of old shoes for a bag of turnips. There have been no further encroachments from the East. Free elections and free opinions are still the rule in those sixteen countries.

The Marshall Plan has been called the most generous act in history. That is a strong statement, but it is true. At the same time it is an act of enlightened self-interest by the American people,—a recognition by them that peace would be an impossibility with 300 million people in Western Europe hungry, cold and desperate.

Atlantic Alliance Is Third Step

We took a third step a month ago when the Senate ratified the North Atlantic Defense Pact. The pact has no offensive possibilities. The essence of it is in the declaration that an attack on one signatory will be deemed an attack on all—plain notice to Moscow that the design characteristic of conquerors from Philip of Macedonia down to Hitler, the strategy of knocking victims off one by one, is no longer available. We have in mind that Russia has three million soldiers under arms, a figure that does not include the armed forces of the satellites. Passage of the pending Foreign Military Assistance Act by Congress will be a further means of preventing those armies from marching.

A dispassionate review of events in this postwar period will prove

that the course taken by the United States has been consistently toward permanent peace. Our measures have not been half-hearted. The decision to aid Greece, the decision to aid European recovery, the decision to make a defensive alliance with the Atlantic powers were bold steps. There was no precedent for them in our past. They form a pattern in that all of them have been based on our conviction that self-governing people do not start wars.

The time is not far off, I hope, when the people of the United States and Canada will form a genuine political and economic union with the free people of Western Europe. I do not minimize the obstacles that are presented. But such a union would assure peace for the foreseeable future, and it would rest on the common ground of freedom. The movement for European federation that has made notable progress in the past year is a strong beginning. I cannot go along with those who promote the notion of world government. They close their eyes to the fact that of the two billion souls on the face of the earth three-fourths live under the rule of absolute autocrats. Government by consent of the governed is not in their experience. Any government on a world-wide basis would not be a government of freedom; it would be simply a government by dictators.

Critics of Yalta, Potsdam Have Not Read Texts

In these years of the "cold war" it has become the fashion to say hard things about the Yalta Agreement and the Potsdam Agreement. Some say that those papers were couched in such uncertain words that honest differences of opinion arose as to their true meaning; hence the cold war. Those critics could not have read the texts. If they had, they could not point to ambiguity in them. The meaning of the papers is so plain that there is no room for differences of opinion as to what was agreed to.

If we were to read today the Declaration on Liberated Europe as agreed to at Yalta, we would see there the unqualified pledge of democratic institutions and free elections responsive to the will of the people in the liberated states and former Nazi satellite states in Europe. If those words had been adhered to, there would have been no forcing of minority rule on Rumania, Poland, Bulgaria, Hungary or Czechoslovakia by Red Army pressure or the secret police. The conversion of these countries formerly free and independent into Soviet satellites is part of the swiftest and most ambitious push for power the world has seen since the day of Alexander the Great. This extension of Soviet dominion has occurred at the very time when Britain was withdrawing from India, Burma, Palestine and Egypt, and the United States was withdrawing from the Philippines. Yet apologists for Moscow in this country make the charge that Britain and the United States are the nations that nurse imperialistic designs.

You will find no uncertainty in the Potsdam Agreement, with its emphasis on economic unity in government of Germany by the occupying nations. If the written agreement had been lived up to, we would not have seen the splintering of Germany into separate economic systems. We would not have seen the situation develop where forty-five million Germans in the three Western zones were only saved from famine by billions of American dollars.

There Is No Vagueness In Yalta Agreement

In short, there is no vagueness in the text of the Yalta Agreement or the text of the Potsdam Agreement. Those compacts have nothing to do with bringing on the "cold war". The trouble has come about by reason of callous indifference to their contents on the part of the small group of men who sit in the Kremlin.

Other critics say that too much was conceded to Soviet Russia at Yalta and Potsdam. A stronger argument can be made to support that proposition. But we should not forget that those agreements were made

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in the course of the war. The important fact to bear in mind is that the arrangements made were in strict conformity with the military realities of the day. At Yalta, for example, it was plain that the Russian Army, not the United States Army, would be the armed force on hand in the countries of Eastern Europe at the time of German defeat and would be in control of the situation in that entire region. Under those conditions what more could have been done than to obtain an engagement that there were to be democratic institutions and free elections in those countries?

A point frequently made is that in the earlier years of the "cold war" we were too conciliatory, that we went too far by way of appeasement. It is true that we have shown a steady adherence to peace in the face of violent provocation, but we have not backed down on any essential point. In the blockade of Berlin we took pains to avoid a head-on collision, but our garrison stood fast and broke the blockade. And in our pursuit of peace we have seen the other nations who believe in freedom rally to our side.

Plutarch wrote of Aristides:

> Aristides took notice that the Spartan captains made themselves offensive by imperiousness and harshness to the

allies. By being himself gentle and considerate with them and by courtesy and disinterested temper he took away the chief command from the Spartans, neither by weapons, ships or horses, but by equity and wise policy.

Chances for Peace Are Good

Will perseverance in our present policy succeed in preventing a third world war? There are strong reasons to believe that it will.

It will never do to discount the risk of war when a dictatorship that controls great resources and knows no moral scruples is incessantly stretching out for more dominion. War came under those conditions ten years ago, and it might come again.

But the United States has seven times the production of steel that the nations behind the Iron Curtain have, and ten times the production of petroleum. Those figures give a fair comparison of the industrial capacities. They are figures that will make a dictator think a long time before starting a war that would find this nation on the other side.

We have the atom bomb and long-range planes with capacity to deliver it. These are powerful assets against the outbreak of war.

Some have forebodings that later on Soviet Russia will overtake us in science and industry. Those fears have little substance. What reason is there to suppose that people who fend for themselves under government of their own choosing will lose ground to people who eke out an isolated existence in slavery and terror?

There is no sure road to peace. But the road we are following, I submit, is the most promising one. Our guide is the principle that whatever strengthens the cause of personal freedom in the world gives strength also to the cause of peace. When people can get their information from uncensored and unpolluted sources, when they can make known their own opinions without fear of punishment, the risk of war, whether it be hot or cold, will have faded off into nothing.

"The Involuntary Good Samaritan"

WE ARE ENDEBTED to Ben W. Palmer of the Minnesota Bar, a member of our Advisory Board, for the following:

Those alarmed at the growing shadow of the totalitarian state will be interested in an article by Dean Pound in the November number of *Fortune* magazine on "The Involuntary Good Samaritan". After discussing the common law principle of no liability without fault, the Dean points out that government today is trying to find "for everyone an involuntary good Samaritan to pull him out of the ditch". Illustrative victims are public utilities, employers and creditors.

"Writers suggest that all injuries through the operation of public utilities be handled by the state through a bureau analogous to those that administer the workmen's compensation laws", says Dean Pound. "It is assumed, in bringing these accidents under the insurance doctrine, that public utilities are in a position to absorb the cost of making good the loss to the luckless victims (where no one is at fault, or even where the victim is at fault) because they can pass the loss on to the public in their charges for services." Dean Pound believes that in the bureau state of today this is fallacious in practice; not impossibly the utility may be required to operate at a loss.

Another "involuntary good Samaritan" is the employer. "The liability of the employer is imposed to maintain the general security by putting heavy pressure on the employer to choose skillful, careful, intelligent employees who will not commit aggressions upon others or subject others to unreasonable risks while in the course of their employment, and to supervise the work of his employees." Dean Pound points out, however, that today "under a regime of collective bargaining, administrative constraint to retain or reinstate employees, vested rights of employees in their jobs, closed shops, limitation of the power to choose and discharge employees, the reason fails."

As to the creditor as another "good Samaritan" Dean Pound says, "For a generation legislation has increasingly limited the power of the creditor to collect, has created more and larger exemptions, and has added to the number who may escape through bankruptcy. Today a corporation that gets into financial difficulties can by reorganization proceedings in bankruptcy compel its creditors to come to the rescue as involuntary good Samaritans." As to the enforcibility of contracts, the Dean takes the position that the constitutional clause against impairing the obligation of contracts "has now, in large part at least, become a mere preachment".

There is nothing in the Bible narrative to show that the man who fell among thieves on his way from Jerusalem to Jericho was at fault. There are undoubtedly those today who would have Dean Pound's involuntary Samaritan help even those whose condition is clearly due to their own laziness, foolishness or fault. Admirable as humanitarian impulses are, we need to watch government here just as we do with respect to the effect of the tax structure upon incentive or venture capital. The hive cannot survive if the drones prevail, even if someone like Dean Pound who throws out a cautionary word may perhaps be labeled a reactionary by those for whom his words are unpalatable.

Are We Really Against Communism?

Reflections upon American Political Philosophy

by Harold R. McKinnon • of the California Bar (San Francisco)

■ In this article, Mr. McKinnon traces in a very interesting manner the change in the attitude of this country toward the Russian Communists since the war. He develops an interesting sidelight on the reasons for this change, suggesting that it may be the result of the exigencies of national defense rather than any fundamental shift in attitude toward the Soviet Union.

■ The history of this country's reaction to Communism illustrates the confusion that results when expediency is substituted for principle in human affairs.

The confusion in this instance is such that an independent observer might seriously question whether as a nation we are really against Communism after all. Let us look at the facts.

Communism originated in a philosophy that was first made known a hundred years ago. This was the philosophy of Marx and Engels which was later developed by various disciples, notably Lenin and Stalin. It was not a secret doctrine but a world-wide call to a revolution, with a popular literature and open emissaries. It emerged from the talking stage when its leaders seized control of the Russian State, a seizure of power, by the way, that was not a revolt against the Czar, but against the democratic regime of Kerensky. Following this success, the movement revealed to the world its methods, which were shockingly opposed to Anglo-American principles of liberty and justice. These methods included imprisonment and execution of political opponents, suppression of the freedoms of religion and speech, and an intellectual and moral slavery that are unparalleled in modern history.

After this revelation of Communism, in theory and in action, what did we do?

America Refuses To Recognize Communist Government

First, we refused to recognize the Soviet government. The grounds for our action were stated by President Wilson, who declared that "in the view of this government there can not be any common ground upon which it can stand with a Power whose conceptions of international relations are so entirely alien to its own, so utterly repugnant to its moral sense", and who also said that we could not hold relations with "a government which is determined . . . to conspire against our institutions, whose diplomats will be the agitators of dangerous revolt, whose spokesmen say they sign agreements with no intention of keeping them". The same views were expressed by President Coolidge, who added: "I do not propose to barter away for the privilege of trade any of the cherished rights of humanity. I do not propose to make merchandise of any American principles." After sixteen years of such intransigence, we recognized the Soviets. This was done by a letter from President Roosevelt to Mr. Litvinoff in which the President expressed the desire to reëstablish normal diplomatic relations, and added: "I trust that the relations now established between our peoples may forever remain normal and friendly, and that our nations henceforth may coöperate for their mutual benefit and for the preservation of the peace of the world."

Communists Were Accepted As Political Party

Next, we accepted the Communists as a party in our national political life. Its candidates ran for public office, including that of President of the United States. Their names appeared on our ballots, side by side with those of the historic American political parties. And their appeal for votes was based upon the doctrines of their party, the Communist Party.

Then we witnessed with indifference, if not with approval, the invasion of government, labor unions and other organizations by Communists and their supporters. In some cases, the presence of the Communists was indicated by unmistak-

able signs; in others, it should have been suspected. But resistance was lacking, and utilizing an easily won hospitality the party imbedded itself almost inextricably in our political and social institutions.

We then became allied with the Soviet Union in a war against tyranny and oppression, although we knew that conquest and subjection were routine Soviet tactics. We had observed these tactics. They had been demonstrated in the denial of civil liberties within the Soviet Union, and in the successive subjugations of Poland, Estonia, Latvia, Lithuania and Finland, the last of which we had viewed with appropriate indignation in Robert Sherwood's play, *There Shall Be No Night*.

We pursued that alliance after the war's end. In coöperation with the Soviet government, we acquiesced in the enslavement of some of the peoples for whose freedom the war had professedly been fought. And our representatives sat with Russians on courts that tried people for collaborating with the Nazis, after Stalin had entered into a pact with Hitler and had said that that pact represented a friendship cemented with blood, and after Molotov had said of Fascism that it was just a matter of taste.

Our Policy Changes Regarding Communism

Now, suddenly, all is changed. Men who ran for public office on the Communist ticket are being prosecuted for pursuing party objectives. Public officials who were charged over ten years ago with being Communists are now being investigated and tried, and loyalty boards are screening the rosters of public employees for the detection of Communists in the civil service ranks. Union leaders whose adherence to the party line has been a notorious fact for many years are suddenly denounced and expelled from the organizations that housed and made use of them. Official fact-finding bodies are flushing out the Communists from the masses of our citizens. Loyalty oaths are being prescribed for educators. Radio dramas are broadcasting the evil thing in our midst. And all through the country there sweeps like a wave a great revulsion which was not there before.

What accounts for this sudden reversal of sentiment, both public and private?

Obviously, it was no new discovery of Communist aims or tactics, because, as we have seen, the philosophy of Communism is a hundred years old, and its tactics have been demonstrated for decades. For example, when Earl Browder ran for President, we knew then, as well as later when we released him from prison while ordinary convicts served out their terms, that he stood for the violent overthrow of this republic. And when we looked with an amiable toleration at the heated crusades of Mr. William Z. Foster, we knew the fact which he later conceded to a congressional committee, that the Communists in America look upon the Soviet Union as their country and that they have only one flag and that that is the red flag of Soviet Russia. And when the governm[illegible]t and labor unions harbored and employed such men or their associates, we knew as well as we know now that their objectives were the same as those we now find so wicked and revolting. What, then, has happened to us? For it must be ourselves who have changed; the Communists haven't.

Present Position Is Result of Soviet Military Power

It is evident that our present position is not one of principle, but of expediency. The difference between the former situation and the present one is that the Soviet Union, which before was weak, is now a military threat of the first magnitude. Furthermore, it is on the march; and it has the atomic bomb; and its jet planes are the fastest in the world.

These things make a difference. A country which possesses these things must be resisted, philosophy and all.

The defect in this reasoning is that the military threat is something quite distinct from the philosophy. We met a military threat in 1917 when we were allied with Japan, Italy and Russia. And we have recently emerged from another military contest, in which we were opposed by countries possessing such divergent philosophies as Japan, Italy and Germany and in which we were an ally of the Soviet Union, which possessed a philosophy that was basically hostile to what was traditional in our culture. In other words, we have not fought wars on the basis of philosophies but on that of national survival. By the same token, war, or the threat of war, should not determine our philosophy, either in respect of what we stand for or what we stand against.

The test of our present position is this. What would happen to our attitude towards Communism if the Soviet military threat were removed?

There is nothing in the history of our relations with Communism that enables us to say that we would not revert to our former apathy and indifference. Anyone who would contradict this will have to meet the burden of explaining our national policy prior to 1945, especially prior to the war. It simply will not do to say that the war enlightened us, because the Communist doctrine and practices had been amply disclosed prior to World War II.

If these conclusions are correct, they present a challenging problem. It is a problem much more important than how to checkmate a military peril. It is the problem of preserving our principles, on which everything else depends.

The Doctrine of Communism Is Anti-God

Instead of the Soviet Union as a military power, let us look for a moment at the Communist doctrine. It is anti-God, and therefore wholly unprincipled from its foundation, because without God there is no source of moral obligation. It main-

tains that matter is the only reality and that therefore all spiritual values are fictitious. It says that man is motivated by economic forces, the present manifestation of which is the class struggle. Instead of a solution of that struggle by just relations achieved through coöperation, it believes in aggravating the struggle with a view to the world-wide triumph of the proletariat by a liquidation, through all available measures, of the property owner. It says that the only certain and reliable guide is the collective consciousness of the proletariat, and that the convictions, hopes and aspirations of individuals are subject to extinction insofar as they conflict with the proletarian gospel. It is not a crime, therefore, to force confessions, or to exile or execute dissenters; nor is there anything wrong in committing forgery or perjury, or in suddenly contradicting the most solemn expressions of doctrine or policy, provided such tactics promote the revolution.

Our rejection of these doctrines should not imply that modern society is immune from criticism. On the contrary, it must be conceded that workers and racial minorities have been subjected to grave injustices in this country as well as elsewhere; that capitalism has sinned grievously and has shown little disposition to repent without coercion; and that the habit of boasting about political democracy is semi-blind as long as that democracy is accompanied in the economic sphere by masses of propertyless wage earners dependent for their livelihoods upon the caprices of their masters. These historic antecedents to the Communist uprising have contributed to its dynamic quality. But that fact does not in any way lessen the evil of Communism, which would substitute for a regime that stands in need of reformation another regime that is intrinsically vicious because it is based upon a degraded philosophy of man.

It is on this point—a sane view of man—that America must regain its orientation regarding Communism if it is to replace its recent confusion and contradictions with a steady, consistent attitude. More than this, principles are the fundamental source of our strength in the world peril, and by the same token we shall be fundamentally weak if we abandon our principles in favor of a day-to-day expediency reflecting the gymnastics of the Communist party line. A nation can stand defeat in a war; if it has principles, it will rise again. But a nation that is wrong in principle is doomed without a war, because it has destroyed itself in advance.

Of all peoples, we are least in need of shifting with every turn of the tide of fortune. The reason is that our nation was founded upon principles which, if steadfastly maintained, in thought and deed, will serve as a bulwark against the transient wickedness of such a thing as Communism. These are the truths that are recorded in our Declaration of Independence: that God exists; that men are spiritual beings who possess rights that are the direct endowment of their Creator; and that the purpose of government is to secure these God-given rights. Implicit in these propositions are the further truths that man is not a product of economic forces or of the state, but that he possesses a dignity that is inalienable because it transcends the wills of men; that beyond all man-made laws there is a higher law to which all government is subject; and that peace is the fruit not of victory in the class conflict but of justice serving the common good of free and rational beings.

Our waverings with regard to Communism are indications that we have lost the deep significance of these principles. Our course, therefore, is plain. It is to regain these truths and to implement them in our society if we are to preserve our heritage against an alien way of life.

Primary Contest Is Over Religion

The primary contest is on the issue of religion. That issue is primary because religion is primary. And religion is primary because unless man recognizes his obligation to his Creator, man makes his own moral law, and in that case the morality of the Communists has as much validity as that of their opponents. Religion is primary for the further reason that unless men possess the motivating power of religion they will be unable to match the dynamic quality of the Communist credo. Therefore if we do not stop Communism on the issue of religion there is no assurance that we will do so on any other.

The next issue is closely akin to that of religion. It is that of the spiritual character of man. For unless we see man as made in the image of God, with a spiritual destiny that transcends the life of the body, there is no basis for treating him differently from animals. The perilous state of our thinking on this subject is indicated by the remark of the late Justice Oliver Wendell Holmes who said that he saw "no reason for attributing to man a significance different in kind from that which belongs to a baboon or to a grain of sand." It is also indicated by a joint declaration of beliefs of a large

Harold R. McKinnon of San Francisco, a native Californian, was admitted to the Bar of that state in 1916 after receiving an A.B. and his LL.B. at the University of Santa Clara. He has been a member of the Association since 1940 and is a member of the Advisory Board of the *Journal*.

number of American intellectual leaders, including the famous educator John Dewey, in which the authors said, "the time has passed for theism [and] deism"; "the universe is self-existing and not created"; "man is a part of nature and has emerged as the result of a continuous process"; "the traditional dualism of mind and body must be rejected"; and "modern science makes unacceptable any supernatural or cosmic guarantees of human values." The fact is that we will never be truly opposed to Communism unless we see in every man, regardless of his race or station in life, a dignity that flows from the spiritual character and essential equality that are described in our Declaration of Independence. That is the real basis for *habeas corpus* as against slave labor camps, and for freedom of thought as against a servile adherence to the party line. If in the past it had also inspired a greater respect for the working man it might have averted some retaliations by labor now, and if it had provided just treatment for minority races it might have prevented some members of such groups from seeking the solace of Communist associations.

Corporate Ownership a Form of Collectivism

On the issue of property, we are under a delusion if we think we are prevailing in that contest while more property is coming under corporate ownership and wage-earners possess nothing but their wages, even though those wages be fair. A stock certificate in a large corporation is not private property in any real sense of the term. It is a right to protect the receipt of dividends by registering a vote in a collectivism that is a halfway mark between private property and public ownership. And a propertyless wage earner is by that very fact a proletarian. Unless we find some way to reverse this trend, and to bring about a broad distribution of ownership of property in the hands of individuals, we shall find ourselves fulfilling a prediction of Karl Marx that capitalism tends toward the collectivism against which it struggles.

On the issue of the omnipotent state, we similarly delude ourselves if we think we are opposing the Soviet doctrine by a concept of state that substitutes a spoon-fed security for a decent self-reliance. Communism substitutes government for private initiative. We can oppose it in this respect only by espousing the doctrine that the state should supplement and aid the maximum efforts of individuals and private associations, not seek to displace those efforts by public administration. We similarly invoke the thing that we would avoid if we cannot solve the problem of capital and labor by just relations voluntarily achieved, instead of by the intervention of government, which would be destructive of the freedom of labor as well as of owner.

Finally, we struggle in vain against any external threat to our society if we witness with complacency the breakdown of the social unit, which is the family. Communism began with a rejection of the family. Reports indicate that the results were so disastrous that it had to reverse itself on that point and seek to stabilize what it had tried to destroy. The disintegration of the family in America has reached the point where progress may depend upon our imitating the Communist procedure in this respect.

Crux of the Matter Is Principles

The crux of the matter is principles. With a sound program of principles, we can really oppose Communism; without one, we cannot, in spite of the energy of our denunciations and the vigor of our prosecutions. I have proposed a minimum program of such principles. It includes the recognition of religion as the primary value and of the spiritual nature of man as the basis of justice and human brotherhood, the restoration of private property on a popular scale, the acknowledgment of the moral limitations of the civil power and of the true function of the state as an aid to private initiative, and the preservation of the family as the basis of social integrity.

The maintenance of such principles does not imply that we need not take all legitimate measures for our protection, including elimination of Communists from responsible organizations and their prosecution for violations of the law. But with such principles we shall have something to protect and without them we shall not. Another result will be that our attitude towards our enemies will not vary from year to year but will be "an ever-fixed mark that looks on tempests, and is never shaken." Above all, the possession of such principles will be a sign that we are solicitous first about our soul; and it was because this country at its birth thought first about its soul that it became the land of the free and the home of the brave.

The Conquering March of an Idea:

The United States as Part of a World Society

by Philip C. Jessup • United States Ambassador at Large

■ Speaking at the Annual Meeting in September before a joint luncheon of the Section of International and Comparative Law and the Junior Bar Conference, United States Ambassador at Large Philip C. Jessup fitted the Universal Declaration of Human Rights and the Convention on Human Rights into the broad pattern of the ideal of international law. Emphasizing that the Declaration and the Convention are only the first steps on the long road that the American people as a nation have chosen to travel, Mr. Jessup declared that we should not be discouraged because we know that treaties will be broken because broken treaties are common phenomena, like broken contracts. He reminded the lawyers present that, as Americans, we do have an actual and a legal interest in the preservation of human rights. Mr. Jessup's address, both forthright and farsighted, is worthy of attention.

■ The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948, has been much discussed. The proposed Convention designed to supplement the Declaration is also under debate. The columns of the AMERICAN BAR ASSOCIATION JOURNAL contain numerous contributions to the study of the question. I do not propose further to analyze the text or to defend or attack the drafting.

At this time the American Bar Association is faced with a larger question. The question is whether this association of leaders of the American legal profession will earnestly support or vigorously challenge this world-wide effort to consolidate and to spread our political and legal philosophy of the position of the individual in human society. I reject the possibility of a third alternation of neutrality, benevolent or otherwise. The American Bar cannot be indifferent to the outcome of this campaign.

Compromise Is Necessary in Drafting

No one would be so utopian as to expect to find a text on any legal subject which would be incapable of improvement through revision by any competent group of lawyers. All legislation, every resolution, every treaty, represents a final compromise. Stylistic and substantive preferences are subordinated or blended in the agreed text. The process of accommodation of views is difficult in a resolutions committee of an association such as this, in the convention of a political party and in a state or federal legislature. It is infinitely more difficult when the process is international. Here differences of language are physical hurdles. Differences of ideas rooted in widely divergent cultures are mountain ranges which must be climbed before the plateau of agreement is reached.

Francis Wellman entitled his book, published in 1903, *The Art of Cross-Examination*. He considered it a branch of the art of advocacy. The negotiations of international accommodation is equally an art. It involves tolerance and a degree of national modesty. We are not—and I hope never will be—engaged in the business of ruling the world. It is not true that the fiat of the United States is law upon the subjects to which it confines its interposition. It is true that our system has demonstrated its success and that success has brought us the opportunity and responsibility for leadership. International leadership is controlled by an innate anti-trust law. The sanction of the law is the loss of the confidence of other nations upon which confidence true international leadership depends. Monopolistic practices defeat themselves as the Germans and Japanese have found in our own time and as others may find to their cost. On the other hand, contributing professional, technical and managerial skill to an international cooperation pays dividends.

International Law and the Individual

A very large part of international affairs and thus of the process of international accommodation, concerns the relations between legal persons known as states. This is necessarily so. But it is no longer novel for the particular interest of the individual human being to break through the mass of interstate relationships. Jefferson could see the struggle between the colonies and the mother country in terms of individuals as well as of their political groupings. Wilson appealed to the Italian people over the heads of their government. Franklin Roosevelt is a symbol in many countries today because he felt and conveyed an interest in the living man and woman. The Communists pervert the process by seeking to subvert governments, alleging an interest in the common man whom they blatantly ignore when they succeed in imposing the power of their small elite governing class.

When the representatives of fifty-one states met at San Francisco in 1945 to frame a world constitution, they too had a declaration of independence from tyranny as the background for their work. This was the Atlantic Charter incorporated in the United Nations Declaration of January 1, 1942. They could not have ignored, if they had wished to do so, the need to provide for a decent respect for the welfare of mankind. Thus the Charter begins with its declaration that, "We, the Peoples of the United Nations, [have] determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women". It recites that the peoples have drawn the Charter through the agency of their representatives. These representatives selected the promotion and encouragement of respect for human rights and fundamental freedoms as one of the purposes of the United Nations. They charged the General Assembly with the duty of assisting in the realization of these rights and freedoms. They devoted a chapter to international economic and social cooperation and therein made it mandatory that "the United Nations shall promote . . . universal respect for, and observance of human rights and fundamental freedoms". For the achievement of this specific purpose as well as others, all members pledged themselves "to take joint and separate action in cooperation with the Organization". They directed the Economic and Social Council to set up a commission on human rights. Thus, as John Foster Dulles has said, the United Nations was created "not merely to protect state against state, but to protect individuals".

U.N. Charter a Beginning, Not an End

Now in due course of international events we are confronted with the normal task of translating into more definite terms the general principles which the Charter enunciates. No constitutional document operates without the supplement of legislation. It was a pity that some regarded the United Nations Charter as an end and not a beginning, as a finished structure rather than the architectural blueprints. Line upon line, precept upon precept, the Charter is now building its practical reality. In the words of a great American lawyer, the process is "slow as measured by our lives but not slow as measured by the lives of nations".

The present effort to put content into the Charter provisions for human rights takes on a double aspect as we consider it here in the American Bar Association. There is first the aspect which confronts American lawyers who must ever be concerned to see that the international obligations of the United States are discharged in full good faith. The Charter is a treaty and as such, under the Constitution, part of the supreme law of the land. The provisions of this treaty with respect to human rights are not wholly self-operative. This fact provides us as a country not with an alibi but with an obligation. The obligation is to transform the promise and the hope into reality.

The second aspect which confronts the American lawyer is to contribute the skills of the legal profession to the effective discharge of the national obligation. There is no place in this task for factional interest or for arrogance. We have achieved much in this country in contributing to the philosophy and to the reality of human rights. We do not pretend to have attained perfection.

American Legal System Might Be Useless Elsewhere

We recognize in our own legal development the importance of environmental factors. The law of water-rights in the southwest is not used or useful in New England. A zoning ordinance suited to New York City is not applicable to a small town in Iowa. The American system of political parties or even the jury system may have no reality for hundreds of millions of people in Asia.

Yet there is a unity of law. It is a unity that overrides divergencies of substance and procedure. The doctrine of consideration is not a universal nor is our concept of a trust. Yet there are great legal maxims which express general legal truths. We recognize their universality by naturalizing them without anglicizing their labels. So it is that the fundamental writ of *habeas corpus* itself retains its Latin name as the equitable rule *sic utere tuo* and the *de minimis* doctrine retain theirs. So it is that Article 38 of the Statute of the International Court of Justice —which "forms an integral part" of the Charter—can refer to "the general principles of law recognized by civilized nations".

It is the opportunity of this and succeeding generations of lawyers to extend the range and volume of these general principles of law to the end envisaged by Cicero when:

> There will not be one law for Rome and another law for Athens, nor one law today and another tomorrow, but among all peoples and for all time one and the same law will apply.

Convention Will Not Eliminate All Injustices

The Declaration of Human Rights and the proposed Convention are

steps along this road. The Declaration is a standard. By adding it to the Charter we repeat the process by which our Bill of Rights was added to the Constitution. Again we have not reached finality. The Convention is the next step—a step that will transmute the general guiding principle into definite legal rule. When we have the rule we shall need machinery for its effective implementation. Neither the principle nor the rule nor the machinery will eliminate injustice or assure respect for rights. Our own history and the history of every country teach us this. The machinery may be abused even as the men and women it is designed to protect may be abused.

We are attacked by the false prophets because individual cases of injustice exist even in this country and are reported in the press. The slurring propaganda seeks to conceal two important truths. The first of these is the fact that injustice in this country is headline news because it is the exception, because it is a striking departure from the general high level of our standards of conduct. The second important truth is that these exceptional cases can be reported because we have a free press which appeals to a highly developed social conscience.

Deprivation of Liberty Not News Elsewhere

On the other hand in countries shrouded by an iron curtain, or we may well say curtained by an iron shroud, it is not news that an individual is deprived of life or liberty, is imprisoned and tortured. This is not novel, it is normal to their unhappy way of life. In that way of life the individual is nothing; the state, embodied in a small ruling clique, is everything. Even if an atrocity were news in our sense of the term, it could not be printed in those countries because there is no free press. These denials of the inherent rights of the human being reach the press only when they pierce the veil and reach the free world outside.

If we had already attained a Ciceronian unity of law and a spiritual unity in our philosophical concept of the place of the individual in human society, it could be argued that respect for human rights is not a matter for international concern. The ordinary processes of law enforcement are indeed matters within the domestic jurisdiction. Yet even here international law has long recognized and our Government and international tribunals have long asserted that there is a standard of civilized justice. Failure to live up to that standard resulting in injury to an alien individual has long been acknowledged to engage a state's international responsibility to pay damages.

International Law Now Multilateral

The international society has come more slowly to recognize that what is involved is really a concern for the individual who has been the victim of barbarous treatment. In our traditional international system of interstate relationships we were impelled to confine ourselves largely to the legal fiction that the state was injured through the injury inflicted upon its citizen. But this was a procedural, not a substantive problem. The rule developed in the era of essentially bilateral relations between states and is still law.

International law has not yet been fully modernized but it has progressed. We have progressed into a multilateral era. We have learned that international organization and international cooperation need not be confined to postage and statistics and weights and measures. The United States not only accepts this concept of international cooperation, it glories in it. We affirm and take pride in our leadership. I repeat it is not the leadership of monopoly or of domination but a participating and shared leadership.

America Is Pledged to Cooperation

I repeat also that in ratifying the Charter of the United Nations we have pledged ourselves to cooperate in promoting "universal respect for and observance of human rights and fundamental freedoms". In 1945 we were free to choose. We could have chosen to go on down the isolationist path. Thank God we chose instead the upward path of cooperation.

PHILIP C. JESSUP

That choice has in a new sense set us free. We are now free to act internationally upon our deep convictions that the welfare of the individual is something we care about not merely because that individual is an American citizen but because he is a human being.

The law of the international society is catching up with the conscience of mankind. Four and five decades ago when American hearts were wrung and American sympathies went out to persecuted minorities in other lands, our Government was hampered by the restrictive rules of the era. Jurists strove to grapple with the human problem and sought to develop the doctrine of humanitarian intervention. That doctrine failed to prosper not because it was humanitarian but because it was unilateral and unilateralism contained the germs of its own fatal malady.

It is not a new thing in American history that we care and care deeply what happens to human beings throughout the world. What is new is our acceptance, along with that of the great majority of other members

of the family of nations, of the principles which give us a legal as well as a moral interest in human happiness.

Americans Do Care What Happens Abroad

There is not one shred of juridical support for the argument that we have no legal interest in human rights. There is no factual evidence that we have no concern about them. As people here we do care what happens to other people elsewhere.

Would this Association adopt a resolution reading:

> RESOLVED: That the American Bar Association finds that the people of the United States have no interest in and are indifferent to the suffering of any individual deprived of basic human rights unless such individual is a citizen of the United States.

Would it adopt any resolution that in effect embodied such a false and obnoxious conclusion even though the meaning were cloaked instead of patent? Nor could this association of lawyers find that there is no legal justification for our evincing our concern in the denial of the basic human rights of any individuals anywhere.

We start then with the premise that we have an actual and a legal interest in the preservation of human rights. Neither the law nor the fact behind that premise can be successfully challenged.

Problem Is One of Method

Our problem is then a problem of method. Some hearts may not be stout enough to face the difficulties of international relations in the world as it exists today. I need not describe the basic nature of those difficulties or their source. We all know what they are. The difficulties are not confined to the consideration of a Declaration and a Covenant of Human Rights. They beset us throughout the social, economic and political fields. Some may wish to surrender without a fight, but that is not the policy of the Government of the United States. It is not the American tradition or the spirit of the American Bar Association.

Some are discouraged by the prospect that treaties will be broken or ignored. Unfortunately they will be. Man is still so imperfect that broken treaties, like broken contracts, are among the common phenomena of life. Life goes on because civilization has advanced far enough to provide a legion of law-abiding, promise-respecting states and individuals. We belong to that legion. We shall continue to make treaties and to respect them because we believe in law and not in anarchy. I see no reason to lapse into either barbarism or defeatism because there are still barbarians at large.

Heavy Responsibility Rests upon Us

A heavy responsibility rests upon us and upon the like-minded peoples of the world. Openly and covertly the dignity and worth of the human person are being assailed. We care about that and we are not ashamed to admit or afraid to proclaim it.

We have an opportunity to participate, to lead in participating in the long process of realizing the aims and aspirations embodied in the Universal Declaration of Human Rights. Why should we neglect this opportunity because this is the beginning rather than the end? We are working with an idea and ideas take time to mature and bear fruit. Is it not worth while to recapture the spirit of a former President of the American Bar Association who said:

> The triumphant march of the conquering hero is admirable and to be greeted with huzzas, but the conquering march of an idea which makes for humanity is more admirable and more to be applauded.

Gray's Inn, London

BITS FROM *Graya*, the magazine for circulation among members of Gray's Inn, London:

> Of late the building activities within the Inn have been extremely impressive. Now the south as well as the north half of the burnt-out top floor of the building which houses the temporary Hall has been re-roofed and the upper floors of No. 14 Gray's Inn Square, shaken by blast and scorched by the fire which destroyed the Chapel next door, have come in for some consolidating repairs. On the other hand, the damaged buildings in South Square have shown signs of collapsing without previous notice of the intended time and prudence has dictated extensive demolitions so that little remains but the intact No. 1. It is sad to see the friendly old Chambers which have stood for nearly two hundred years going down before the housebreaker. The operations were precipitated by a heavy fall of bricks early one morning in the south-east corner of the Square. Another recent innovation in the way of works, is the barbed wire entanglement above the Fulwood Court gateway which for some time has been permanently closed, though against what danger has not yet appeared.
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> Two decisions of the Masters of the Bench which were put into effect in Trinity dining term were much appreciated by Members of Hall. The first was the serving of one bottle of wine in each Bar mess in addition to the previous post-war allowance of beer and a bottle of sherry or port. The second was that a small decanter of wine (about one third of a bottle) might be ordered by Mr. Senior as the penalty for any breach of the Ancient Customs of the Society. The cost of this "fine" to the offender will be the pre-war figure of five shillings. We hope that this second decision may serve to induce "Mr. Senior" to take a firmer line with those who are in breach of our Ancient Customs, particularly those who disregard the customs as to dress.

The Proposed Federal Administrative Court:

The Arguments for Its Adoption

by **Louis G. Caldwell** • of the District of Columbia Bar

■ The proposal to establish an Administrative Court of the United States, embodied in the bills introduced in the 81st Congress by Senator McCarran (S. 684) and Congressman Celler (H.R. 4661), respective Chairmen of the Senate and House Committees on the Judiciary, is favored in this article by Mr. Caldwell, a pioneer in the Association's efforts toward the improvement of administrative law. Before the Section of Administrative Law at its St. Louis meeting, he debated the issue with Alfred J. Schweppe, of the Seattle Bar, whose opposing views appeared in the July issue of the *Journal*.

■ Shall we have a federal administrative Court?

The question reminds me of the man who was asked, "Would you like a book for Christmas?" He replied, "I already have a book."

In our federal administrative court library we have many books of all sizes, shapes and colors, ranging from large quartos to tiny pamphlets hidden in back of the shelves, from old gold to pale pink, some battered and dog-eared and some showing signs of very little use.

The exact number of existing administrative courts depends on definitions. Many of the definitions are cluttered with barnacles and vary about as much as the rules on Canasta. Too often they are exercises in semantics for which we have no time today. Whatever definitions be adopted, there are still many administrative courts, very many.

Under the Constitution the judicial power of the United States is vested in a Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. In actual practice, the judicial power of the United States is trifurcated into three principal categories of tribunals: constitutional courts, legislative courts, and administrative agencies.

Our constitutional courts consist of an orderly and reasonably symmetrical pyramid. At its base are the many districts into which the country is divided by statute, with 207 federal district court judges.[1] At the middle level, are the eleven courts of appeals and sixty-five justices. At the apex is the Supreme Court with its nine justices and with the entire country as its domain. Our judicial pyramid is built on a *geographical* basis.

As to the next classification, "legislative" courts, I am sorry we had to use the term. The term is misleading. With one exception, the Supreme Court, *all* federal tribunals performing judicial functions are legislative in the sense that they were created by Congress. The term is usually used as a convenient catch-all for a heterogeny of tribunals, namely, the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court, the Tax Court, the United States Emergency Court of Appeals, the territorial courts and, with reference to some of their jurisdiction, the courts of the District of Columbia. There are few if any common threads or common denominators. In general, they are not encumbered with any functions other than the decision of controversies, *i.e.*, essentially judicial functions, and some of them are specialized courts. Notice that each of these specialized courts is a departure from the original architecture of the pyramid. With exceptions, each of them has the whole country for its province. All of these legislative courts, wholly or in part, are really administrative courts.

Federal Administrative Agencies Make Up Third Category

The third category of tribunals now performing judicial functions in the United States is the conglomerate of federal administrative agencies. They are combinations of prosecutor and judge, or of prosecutor, legislator

1. I have taken into account the increase in judicial positions, both in the lower and appellate courts, recently authorized by Congress.

and judge, over the same subject matter. As of January, 1935, we counted seventy-three such tribunals exercising judicial power in 267 classes of cases. Others, proceeding under somewhat different definitions, placed the number of tribunals as low as about thirty-five. I would settle for either figure. Subsequent events have increased the score but I have not attempted a recount.

Are the functions of these tribunals judicial? The resemblance is at least startling. These tribunals enter orders equivalent to money judgments in civil proceedings between the United States and individuals. They assess substantial money penalties for violations of federal statutes or of regulations promulgated by the tribunals themselves. They enter orders in the nature of awards of civil damages in controversies between individuals. They issue directive orders equivalent to those rendered by courts in injunction proceedings, calling them cease-and-desist orders. They enter orders like those entered in mandamus proceedings prescribing conduct for the future.

Just as important as any of these, and I think more important, is the life-and-death power which many of these agencies exercise over the privilege of engaging or continuing in important businesses, professions and activities of various kinds. This is accomplished through the widespread and increasing use of the license system, or its equivalent. There are other orders, activities and penalties difficult to classify.

All these administrative courts, which we call administrative agencies, depart radically from the model judicial pyramid. They have obtained jurisdiction over a very large portion of what would otherwise be cases and controversies in the courts. At times it seems to me that we are en route, in a clumsy and faltering manner, toward building an entirely different base for our pyramid and that instead of dividing the country into geographical subdivisions, we are dividing it into kinds of business and other kinds of activity, crossing and criss-crossing with each other and with the courts.

Whether To Have Administrative Court Is Not the Problem

Shall we have an administrative court? What a question! We already have anywhere from fifty to one hundred of them in the Federal Government alone (including several with appellate jurisdiction). We have more of them than any other country in the world, more than any other country in history. Their jurisdiction is overlapping and conflicting, they exhibit a kaleidoscopic variety in practice and procedure, they develop widely different principles of law on issues calling for uniform principles, they entail a vast and unnecessary duplication of expense, and they are burdened with a bewildering multiplicity of methods for obtaining judicial review of their determinations. These methods vary between no review at all, review by other administrative agencies, review by legislative courts, review by federal district courts, review by statutory three-judge courts, review by the several courts of appeals, review by the United States District Court for the District of Columbia, review by the United States Court of Appeals for the District of Columbia, and, in a few instances, review directly by the Supreme Court of the United States.

No, our problem is *not* whether to establish an administrative court. It is to find some means to bring order and simplicity into the labyrinth formed by a multiplicity of administrative courts and of methods of reviewing their decisions; to bring these many administrative courts back into our judicial system and, so far as we can, to restore the original design, or at least to achieve something partly as good.

Administrative Court Is Specialized Court

This is as good a time as any to digress and to venture a tentative definition of the term "administrative court", simply to clarify our discussion. The difficulties in arriving at a satisfactory definition are largely of our own creation and imagination, exercised in our behalf by the Supreme Court. All we are really talking about is a *specialized* court, a court with jurisdiction limited to one or more classes of controversies between individuals or between the Government and individuals, either at the original trial level or on appeal. Either by statute or by voluntary subdivision of labor, we have many specialized courts within the judicial system in this country, probate courts, juvenile courts, criminal courts, divorce courts and what not. Similarly, we have administrative courts specializing in the adjudication of controversies in transportation, communications, securities, relations between employers and employees, and so forth. We have appellate administrative tribunals limited to review of particular classes of cases, ranging from the Court of Customs and Patent Appeals to the Board of Tax Appeals. There is nothing very revolutionary in proposing that review of the decisions of a number of specialized lower courts be centralized in a more broadly specialized appellate court.

A terrific headache is caused by the meanings and the limitations the Supreme Court has read into such terms as "legislative court" and "administrative agency", usually citing the Constitution as authority. A legislative court (including the courts of the District of Columbia and the territorial courts) may perform just about any function Congress cares to vest in it. Constitutional courts may not. The distinctions drawn by the Supreme Court in these matters seem tenuous and perhaps someday the Court will repent. As long as the cases are still in the books, it is wise to take them into account. If we are to establish a court of review specializing in the decisions of some or all of the federal administrative agencies, we might as well either make use of an existing legislative court or a court that may be endowed with the functions of a legislative court, or dress up a new tribunal as a legislative court.

Does the bill to establish an Administrative Court of the United

States contribute materially to a solution of our problem? Before I can give you my own opinion on these questions intelligibly, I must take a few minutes for background.

Mistake Was in Departing from Simple Structure

The root of the evil is, to my mind, the mistake we made many years ago in departing from the majestic simplicity of the original architecture of our Government, and particularly in excessive trifling with one of its cornerstones, the separation-of-powers doctrine. I believe the desired balance could have been better achieved within the framework of the original plan than it has been with the polyglot of buildings and lean-tos that now confront us. Insofar as it requires an independent judiciary, it is too late to retrace completely our steps but perhaps it is still permissible to give expression to a vision of at least a partial restoration.

A single illustration will have to suffice. The Treasury Department has countless controversies with individuals and corporations in this country over taxes. When they have passed the stage of negotiation and have reached the point where hearing and adjudication are necessary, these controversies (with certain exceptions) go to a separate tribunal, the Tax Court. It is a judicial tribunal at the trial level. It is an administrative court and, so far as I am informed, it is a success. It does a pretty good job of riding circuit around the country. I hope that some day the same principle will be applied to all governmental agencies, *i.e.*, that all the so-called independent expert commissions and boards will be incorporated in one or more of the existing executive departments, or in new departments, and that all judicial functions performed in these departments will be segregated into administrative courts analogous to the Tax Court.

Once that step is taken, it is not a far cry to a superior administrative court (or courts) of appeals, with wide latitude as to composition and scope and suitably equipped for riding circuit over the country. The reports of our Special Committee on Administrative Law in 1933, 1934 and 1936 all suggested or proposed such a system of administrative courts as one of two possible desirable alternatives.

Trial Level Presents Greatest Problem

Frankly, the greatest challenge in the administrative process seems to me to be at the lower or trial level. In earlier years I was inclined to emphasize the evils of the combination of prosecutor and judge, resulting in a too frequent bias in favor of the prosecution. I still believe these evils are real and substantial. I have since become convinced that there is another evil of a practical nature which is perhaps more important. When burdened with the tedious chore of hearing and deciding individual cases, the administrative agency will neglect the job for which it is best fitted and wherein it can make the most signal contribution to its country's welfare, *i.e.*, the use of its expert knowledge, its facilities and its time to formulate standards, rules and regulations in specialized technical fields. I have watched this demonstrated over and over again in the field with which I am most familiar. I could elaborate on this for hours.

So much for my own approach to the problem. I am under no illusion as to its chance of being translated into law. Even the Hoover Commission did not see the point.

After this long prelude, I come to the bill to establish a federal administrative court, as introduced and amended by Senator Pat McCarran. I shall not claim that the bill is a panacea or that it is an answer to more than a small segment of the problem. I shall not attempt to justify it in its details. Frankly, I regard it as an experiment (of a noble character) and as a basis for discussion that will undoubtedly result in desirable changes and improvements. But I think the proposal is in the right direction. It is not merely a new soap to clean the dirt off other pieces of soap.

Except to a minor degree the bill does not grapple with the problem at the *nisi prius* or trial stage of administrative controversies. It deals with the appellate stage. This appellate stage, however, is also very important.

Provisions of Bill Are Outlined

The bill sets up a five-judge court, to be known as the Administrative Court of the United States. It confers upon this court jurisdiction (1) in any case involving the judicial review of agency action, otherwise cognizable or pending in any court of the United States other than the Supreme Court, and (2) in any case involving the civil enforcement of the rules, orders or investigative demands of any such agency. In both instances this jurisdiction is conferred only at the request, not of the agency, but of the person affected. Don't let anyone get you stirred up over this. Remember that the agencies are combinations of judge and prosecutor. Agencies don't appeal from their own decisions, at least not in my experience. The one or more private parties adversely affected are the persons who want and need the right of appeal. There is also a provision in the bill, which as a practical matter may be ineffective, permitting but not requiring an agency to institute in the court an original action for suspension or revocation of license.

The proposed tribunal is given the garb of a legislative court. Ordinarily, one of the five judges may decide a case, subject to review (not mandatory) by three or more judges sitting as an appellate division. Where present statutes require a court of more than one judge (*i.e.*, the Urgent Deficiencies Act), then not less than three judges must participate. Provision is made for review by the Supreme Court on writ of *certiorari*, appeal, and certification of questions of law, within certain limitations.

The present jurisdiction of the United States District Courts and the Courts of Appeals is preserved, so that in effect persons affected by

agency decision have an option to go before these courts insofar as they may do so under present law. There is language in the bill which may be construed to confer upon the new court a scope of review somewhat greater than is now conferred upon the District Courts and the Courts of Appeals in some classes of cases. This may serve to attract appeals to this court. Even if this is not so, since the tribunal is a legislative court, Congress will be free to enlarge its scope of review beyond what it may confer on the constitutional courts.

Bill Also Applies to District of Columbia

In the original bill, the District of Columbia courts were deprived of all jurisdiction over controversies embraced within the bill. The bill was later amended, however, so that parties affected would have the same option in the District as they have elsewhere. I am glad this amendment was made. In fact, I see no objection to further amendment of the bill so that, in effect, the District of Columbia Court of Appeals, with appropriate enlargement and divisions, takes on all or most of the proposed jurisdiction. As I have already stated, it also is a legislative court to the extent that Congress desires to treat it as such, although it enjoys the protection given by the Constitution to constitutional courts as to tenure of office and compensation.

Is this proposed new court the answer to the problem raised by the multiplicity and heterogeneity of existing federal administrative courts? Obviously it is not, and is not intended to be, a *complete* answer. It will not prevent deep-freezer episodes. Except to a minor degree, it does not deal or attempt to deal with the controversies over which existing administrative courts have jurisdiction at the original trial or *nisi prius* level. It does not absorb or overlap any of the jurisdiction of our principle so-called legislative courts, the Customs Court, the Court of Customs and Patent Appeals, the Court of Claims and the Tax Court. It has no jurisdiction over cases involving an issue of tax liability, involving the grant or dismissal of a patent, or wherein and insofar as a money judgment is brought. With these exceptions, by and large the bill simply confers on the proposed new court jurisdiction parallel to that now exercised by the courts of the United States other than the Supreme Court in reviewing the actions of federal administrative agencies. All courts retain whatever jurisdiction they now have, so that the new court provides simply an optional method of review, at the instance of non-agency parties.

New Court Would Give Chance To Appraise Experiment

This feature has been criticized as an admission that the proposed court is not needed and that the regular federal courts are adequate to meet the problem. Such criticism takes an unfair advantage over what I believe was an attempt to be cautious, temperate and fair in launching a worth-while experiment. Certainly, those who drafted this bill could have boldly proposed to deprive the regular federal courts of all such jurisdiction and to confer it exclusively on the new court. If they had done so, I am sure the criticism would have been far more clamorous and vociferous. The milder approach seems to be reasonable and well justified. It will give all of us an opportunity to appraise the experiment in actual operation, both in itself and in comparison with the federal courts, without any abrupt dismantling of our present machinery at least until we know that the new machine gives better service.

What are the advantages of this proposed new court? What will be its contribution toward solution of our problem?

First and foremost, in my opinion, are the advantages that flow from the expertness resulting from specialization. The specialization will not be as narrow as is found, say, in the Interstate Commerce Commission. It will have a fairly broad base and scope in view of the many kinds of agency actions subject to review. Still, it will be specialization when compared to the jurisdiction exercised by the federal courts. Instead of a very occasional glimpse at the performance of this agency or that, with little or no opportunity to appraise the problems and dangers of other administrative agencies which may or may not be of similar character, this new court should, through a constant procession of cases, become expert in the administrative process as a whole as well as in the business of particular agencies. I have high hopes, for example, that through frequent encounters with the license system (which is the most formidable weapon of government regulation and the most susceptible to abuse) the court will develop a coherent body of law, now woefully lacking, which will look below the surface and at the substance. I hope that the court will become expert in rate regulation as a whole, not simply from the point of view of railroad and motor bus transportation but from the point of view of the five or six other industries that are subject to rate regulation by as many federal agencies. I hope the court will become expert in the problems of due process and of practice and procedure before administrative agencies and find ways and means of reconciling the Government's need for efficiency with the individual's right to justice, in broad terms and not simply in terms of one agency.

Perhaps Bill Should Go Further

It is easy to say that no greater expertness is required in administrative cases than in many nonadministrative cases. Even if this be true, simply because the courts have been perhaps unfairly burdened in some classes of cases (*e.g.*, patent cases) is no reason for not attempting to relieve them in others. Perhaps this bill does not go far enough. We have had occasion, however, to watch several specialized courts in action and to see the advantages of specialization demonstrated. This is true not only of the Customs Court, the Court of Customs and Patent Ap-

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Performance Courses in the Study of Law:

A Proposal for Reform of Legal Education

by Louis L. Roberts • of the Indiana Bar

■ Mr. Roberts says frankly that our law schools are not preparing their students to practice law, and that the freshman lawyer must gain his knowledge of practice at the expense of his clients. Pointing out that all other professions include practical techniques in their academic training, he proposes the same for the law schools. This is a vigorous, competent analysis of the problem, and Mr. Roberts' solution deserves attention.

■ Thirty years ago Jim Barrister completed his law studies at an eastern university, served his country in its Armed Services and on his return was admitted to the Bar and "began the practice of law". This young lawyer had better than the average preparation of his day. A Phi Beta Kappa student in college, he had taught several years in secondary schools and had obtained his master's degree before entering upon the study of law. He had been matured in the seasoning experiences of war. Yet, he soon bitterly learned that, of all the fields of human knowledge, that which he knew least was how to practice law. In fact, he knew practically nothing.

What did Jim Barrister do about it? Only he could tell the story in detail, but this much we know. He lost his first trial because he did not know that a defendant was not obliged to appear without subpoena at the trial if his lawyer was present. Jim had never seen in his life a lawsuit from beginning to end, nor had he been required to study in their sequence the pleadings in one, much less to prepare them. He tried to study the practice books of his state but soon discovered that he lacked the elementary knowledge of procedure sufficient to understand them clearly. He began to haunt the courtrooms, and he heard a number of trials. He observed the conduct of the lawyers and learned much that was good and much that was bad. In the meantime, he laboriously prepared a few leases and other legal instruments after recalling his clients repeatedly for omitted information. The form books never seemed to have a form that fitted his purpose. Fortunately, he was not employed for some time in important litigation, and he began to develop a fear of being so employed. He was reluctant to take his problems to older and more experienced lawyers, and he envied the ease and poise of the leaders of his Bar both in court and in their offices. It was little consolation to know that other young lawyers whom he knew were having the same heartaches. Deflated as he was, he knew that he had a superior education and that he was industrious and ambitious to establish himself as a lawyer, and he was determined to succeed.

It would not be fair to say that Jim Barrister was not learning in his struggles, but he most certainly was learning the difficult way. He wrote his favorite law professor about his troubles, but he found little consolation in the reply. The professor wrote that Jim had a thorough foundation for the practice; that his work in law school had given promise of a successful professional career; that almost every lawyer educated in a law school had the same difficulties during his early days in the practice, but that experience would in time remove his doubts, and not to give up. Jim was a man of high ideals and morals. Somehow he could not reconcile the certificate stating that he was authorized to practice law with his ability to practice law.

Young Lawyers See Only Part of Lawyer's Work

Gradually, as he visited the courts and heard lawyers try cases, it began to dawn on him that he was hearing only the second acts of these legal dramas and was missing entirely the prologues and the first and third acts. Of course he could not observe the lawyer's part in employment by

the client, his investigation and interviews with client and witnesses or any of the efforts at settlement without litigation, all of which might be termed the prologue. But he could follow the pleadings, and all the proceedings in court up to the day of trial, for he had access to the court files. He could at least come in for the first act, and this he did.

Jim Barrister began watching for the filing by excellent law firms of interesting cases that he thought would be defended by equally good lawyers. He began to follow these cases as if he had a real interest in them. He studied the pleadings. Often, he even prepared his own motions and responsive pleadings which he compared with those that were actually filed. He studied the briefs and listened to the arguments on the several motions. For the first time in his life he observed the forming of a law suit and learned what was meant by a joinder of the issues. When these cases came on for trial, Jim was there. He watched the *voir dire* examination of the jury, the human factors involved in their selection. He appreciated for the first time the importance of the dramatics of the action and witnessed knowingly the careful or careless staging of these legal dramas. He compared the conduct and performances of opposing counsel in the atmosphere of the court and jury. He tried to detect the strategy and plan of offense or defense of the attorneys in their opening statements to the jury. In the direct and cross examination of witnesses and in the objections and motions to strike he saw how the skilled lawyer maintained his poise and refused to be deflected in his course, keeping always in mind that it was the jury who were to be the final arbiter of the facts. Objectively, he sympathized with the abused and ignorant witness, and resented the arrogance of his examiner. He applauded the skill and human understanding of the lawyer who won over a hostile and prejudiced witness by the skill and finesse of his cross examination. He was impressed with the uniform courtesy with which some of the lawyers treated every witness, and he was utterly disgusted, as he thought the jury must be, with the arrogant and abusive treatment by some lawyers of the witnesses of the opposing party. He could not fail to note that the judge was not impartial in his consideration of the attorneys. He who took the high ground and indicated his appreciation of his responsibility as an officer of the court in the administration of justice, believing in the cause in which he was an advocate, yet who remained conscious of his trust both to client and court, was favored by the court in those intangibles of persuasion over his less understanding opponent.

Barrister Begins To Learn the Ways of the Law

Young Barrister learned that the brilliant lawyer did not always win his case, and that thorough preparation and hard work before trial paid the highest dividends. As he observed the legal tide of battle shift back and forth from plaintiff to defendant, he would become a partisan for one side or the other, and he believed that the jury were likewise taking sides. Then he undertook to analyze his favoritism to find out what influences were responsible. In this he met some surprises. He found that he was almost unconsciously swayed in every case by a combination of intangibles difficult to define or describe, such as the dress of the lawyers, their apparent sincerity or lack of it, their degree of preparation evidenced by the clarity of their statements to the court and jury, the appearance and conduct of the respective parties and those mannerisms that incline or repel. He shared the impatience of the jury with the counsel who could not keep track of his papers or locate his witness when called. He contrasted the effect on himself of prepared, alert and spirited direct and cross examination of witnesses with the tedious, listless or abusive kind. In the summations and arguments before the jury, he was impressed in the same manner, and he thought he could often detect similar reactions in the facial expressions and postures of the jurors. He saw that juries resented lawyers who misquoted the testimony, and respected advocates whose manner was at all times professional yet loyal and persevering in the cause of their clients. Many times would Jim recall the almost forgotten story of the young lawyer at the end of his first jury trial in which he had been opposed by a former justice of the state's supreme court, who had a reputation for arrogance, abuse and intimidation, especially of beginners in the practice. Because of his age and former judicial position, the trial judge was reluctant to control the older lawyer and for several days the young man was unmercifully cuffed about. However, to the amazement of the youngster the verdict of the jury was in his favor. He thanked the jury and later sought out its foreman and asked him what it was that he had done in the trial of the case that was most controlling and persuasive of the verdict. The foreman replied: "Young man, we didn't pay any attention to what you did. Don't you know, that old bozo, Judge ..... couldn't get justice in this county in any kind of a case?"

Young Lawyer Is Helpless Without "Know-How"

Jim Barrister continued to observe, to study and to work hard and gradually, but all too slowly, he began to acquire a clientele. He owned no car, could not afford to join any clubs, lived modestly and kept out of debt. Slowly, he gained the respect of the Bar and the confidence of his clients, but throughout it all he repeatedly asked himself: "Why didn't they tell me these things in law school?" In almost all that he did he found that "know-how" was his greatest deficiency and that without that he was helpless. How should a law office be conducted and managed? What was the value of his services, how much should he charge his client? Oh yes, he had a course in legal ethics and had read the Canons of Professional Ethics of the American Bar Associa-

tion, but all that was abstract. In short Jim Barrister was brought to the realization that the relation between his courses in law school and actual practice of law was about as close as the relation between Butt's Manual and World War I trench warfare. For the benefit of those who are familiar with neither, that wasn't very close.

This was the situation of the law school graduate of a generation ago. Are graduates today better prepared for the practice? They are not. In fact, because of the increasing complexity of modern society, commerce and industry and the great expansion of administrative procedures and tribunals, there are many who believe that the young lawyer of today begins practice under a greater handicap than did his father. Have the law schools of today *seriously* tried to do anything about it? Yes, but some are just talking about it, a few are shyly experimenting, but none have boldly and courageously undertaken a solution. The result is that too many graduates of modern law schools have little or no knowledge of the practical work of the law. This knowledge they must gain after admission to the Bar, *after they begin the practice of law*. That this is a deficiency in our system of legal education is generally admitted and is attested by law clinics, legal aid work, local bar association activities for young lawyers and similar extra-curricular activities.

Students Not Even Prepared To Enter Law Office

Critics of the modern law school, and they are many, are often either successful practicing lawyers who repeatedly have the experience of receiving into their offices law school men whose preparation for the actual practice is practically nil, or the disillusioned young lawyers themselves. It is not an exaggeration to say that too many young men, law graduates, if successful in obtaining a position in a busy law office, find themselves wholly unprepared to undertake the simplest routine lawyer tasks. Moreover, whether or not our young lawyer finds a place in an established law firm or, failing that "hangs out his own shingle", he does not know the problems of practice with which he will be confronted, and of course he has had little or no training in how to meet them. He has been "admitted to the practice of law", as is evidenced by his duly attested and sealed certificate of the highest court of his state, but in his heart of hearts he is brought to the realization *for the first time* of the inadequacy of his preparation. His college and law school may have given him the tools of his profession and those tools he must have, but he has never been trained in the use of even the simplest of these tools. He is like the budding artist who has studied the masterpieces of painting, but has never painted a picture. In no other profession, medicine, dentistry, engineering, architecture, in none of the arts, music, painting, sculpturing nor in any of the sciences is the training in the use of the tool of knowledge so neglected in our educational scheme.

Those who are satisfied with the conventional plan of legal training, while admitting the desirability of instruction in the practice of law, defend their attitude and advance several reasons in justification. They contend that if law school requirements were extended to four or five years it might be feasible to include more practical courses, but that the present three-year course is scarcely sufficient for sound instruction in substantive law and in the great rules and the sound philosophy of justice. They say that a student can never learn how to practice law in a law school, but that if he is grounded in the principles of the law he can learn how to apply them from experienced lawyers or from his own experience in the practice. It is said that to enlarge the facilities of our law schools to permit the practical courses would be most expensive in material equipment and prohibitive in personnel. Then there are those with injured pedagogical ego who reply that they are not teaching "a trade" like brick laying or plumbing, but great principles of law to young leaders of society, and they will have no concern with the sordid matter of whether the end products of their teaching can earn their living as lawyers.

Louis L. Roberts is now retired and lives in St. Louis, Missouri. A native of Indiana, he practiced in Evansville for more than twenty years. He was a teacher before World War I and again taught law after World War II. He was an officer in the Army in both wars.

Average Law Student Has Never Seen Trial

A critical examination of the law school graduate will disclose a rather sorry novice. He has read and studied thousands of so-called "cases" from his casebooks or the reports supplemented by the lectures of his instructors and classroom discussion—yet he has never witnessed a lawsuit, nor has he even read the transcript of one. *The so-called cases that he has read and studied are not lawsuits.* The best are but essays on a series of human relationships that gave rise to the legal controversy and on the errors if any, in their solution by the lower court. But the student does not see the briefs, or a transcript of the evidence, or the arguments of counsel in the court in which the opinion is written, and obviously sees or hears nothing of the mechanics, pleadings or testimony and evidence in the trial court from

which the appeal was taken except for the brief reference thereto that may appear in the opinion itself.

Lawyer's Work Begins When Client Consults Him

It would seem obvious that the lawyer's place in litigation begins when he is *first consulted by his client*, whose recital of his grievance is seldom if ever impersonal and often requires further investigation by his lawyer. Once the provable facts are ascertained, it becomes the duty of his lawyer to determine the legal rights that have been invaded, the legal remedy and the forum for their redress. Pleadings are prepared and filed, and the defendant made to appear or default. Eventually if the lawsuit proceeds to trial, the issues must be joined, and in that process there may be one or more briefs and oral arguments before the judge. There must be the trial preparation that includes both the assembly of witnesses and such evidence as may be pertinent, as well as an anticipation of and preparation to meet such law questions as may arise during the trial. If trial is had by jury the lawyer must be able to advise the trial judge with respect to the instructions or charge that he is required to give to the jury to aid them in their verdict.

If successful, the lawyer must prepare or be able to determine the correctness of the form of the judgment as well as the correctness of the form of all of the court entries that may affect it. The unsuccessful litigant may wish to appeal and his lawyer becomes responsible for the proper preparation of the record for the appeal and its timely filing, together with the further pleadings in the court of appeal. Briefs are required, and oral arguments may be had in the higher court. Finally the appellate court makes its decision and one of its members is selected to write an "opinion" expressive of the judgment of the majority and intended to give the legal reasons for the court's decision. This "opinion" is then published in the official reports of the court and such opinions are the sources from which the casebooks in law schools are compiled—and that is where the law student comes in for the first time.

Modern Law Schools Teach Law Teachers

The statement has been made by others, and this writer agrees, that our law schools are functionally designed to and are presently educating teachers of law who in turn can train still more teachers of law in the system in which they were taught. But whether or not our law schools are "law-teacher schools", they most assuredly are not "lawyer schools". There is a decided difference between the law as found in casebooks and the practice of law. Unfortunately, the law student has no opportunity to learn or experience in the slightest degree the human phases of the administration of justice. He is the student of legal surgery but he has never seen an operation, much less participated in one. In practice he must make a legal diagnosis of the ills of every client who consults him, yet in his training and education he has never made nor has he ever seen a diagnosis or a client in the flesh. It will not suffice to say that he has been given many statements of fact to which he has been required to apply the rules of law, for he has never had to obtain the facts himself; nor does he have the skill, the psychology, or any of the other factors of human relationships employed by the skilled practitioner in his determination of the facts. The student physician in medical college is instructed not only in the methods of subjective examination of his patient, but also in the employment of the instrumentalities of objective examination, the combined findings of which form the basis of the diagnosis of the illness of his patient and point to the treatment. If training in the law is to be comprehensive, then the law student at least should be exposed to similar methods.

What are the facts? They are not very complimentary to our modern law schools. The graduate has studied real property, but probably has never examined abstracts of title and usually has never seen one. He has never made a search of title, or prepared a title opinion, nor has he drafted a legal instrument in relation to a title or interest in land. He "passed" contracts, but he never wrote one. Certainly he has never had an interview with a client from whom the information must be first obtained if a contract is to be written. He may have led his class in wills, yet, he has never prepared one. He has never been led through the processes of proving or defending a will in probate, or the appointment and qualification of the executor and the administration of the testator's estate. His course in trusts has been similar, but his knowledge of how to prepare the necessary documents for their establishment and execution is even smaller than his knowledge of decedents' estates. Scarcely any male adult can now be found who does not have some form of insurance—life, casualty or indemnity, and the volume of work in respect of insurance requires a considerable part of the professional time of lawyers. Yet the practical aspects of the subject with which the lawyer will be most concerned are almost totally neglected in law schools. Most of the corporation work of the average lawyer is concerned with the organization of small corporations; the preparation and filing of the articles of incorporation, guiding and preparing the minutes of the first meeting of the incorporators and stockholders, the election of directors, the first meeting of the directors, preparation of by-laws and election of officers, the issuance of the initial stock and the filing of the corporate reports. If any graduate of any present-day law school has ever performed all these duties in his law school in their sequence, it is without the knowledge of the writer or the teachers with whom the subject was discussed.

The situation with respect to procedural courses is substantially the same. Cases are read on pleading.

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A Tradition Dies in Connecticut:

Law Office Preparation for the Bar Is Abolished

by **Charles M. Lyman** • of the Connecticut Bar (New Haven)

■ The oldest method of preparing candidates for the Bar—study in the office of an experienced lawyer—was abolished in Connecticut at the beginning of last year, when the rule was adopted that all applicants for admission to the bar examination submit proof of graduation from college and from a law school. Mr. Lyman believes that this was a mistake, and he sets forth his reasons clearly and concisely in this article.

■ In February, 1948, by fiat effective after December, 1948, the judges of the Superior Court (having power to make rules for admission to the Bar) struck from the roll of law schools accredited by the State of Connecticut the institution that had trained for the Bar Daniel Webster, Abraham Lincoln, Oliver Ellsworth, Zephaniah Swift, Mr. Justice Robert H. Jackson, Judge Carl Foster (retired judge of the Superior Court), and more than is ordinarily realized of our respected practitioners at the Connecticut Bar.

This appears to be a frank admission that the bar examination is an inadequate method of protecting the public against relying upon legal advice from men and women not properly qualified to advise; and no one will deny that protection of the public is the sole object in laying down any standards at all for admission to the Bar. If passing the bar examination is an adequate test, then why lay down any requirement for taking the test other than a reasonable guaranty that the applicant has made a serious effort to prepare himself to pass it? And if the background and method of study are to be made the test, then why not base the admission to the Bar on the nature of the legal education and the degree of success in the law school, and do away with the examination entirely? If the applicant is really to be judged by his education rather than his ability to meet a test in common with all applicants, there is no need for the expenditure of time, energy and money that each examination demands. It is neither reasonable nor fair to prejudge the ability of a conscientious student of the law, by whatever method of study, to acquire knowledge sufficient to pass the required test.

New Rule Abolishes Old Tradition

The abolition of this historic law school is brought about by a new rule of court requiring both an undergraduate degree and a law degree before an applicant may even take the examination, and eliminating the method of study in the office of a practicing attorney. In adopting this rule, without any factual experience demanding it, and with the history of bar admissions in recent years to refer to, the judges have failed to show any of the following qualities: a due regard for the purpose of establishing standards for admission, a reasonable consideration of the experience with men trained in the historic method, a sense of fairness to the man who has the qualities to make an excellent lawyer but who has not the means to abandon the support of an already-acquired family and go to law school for three years, or a consistency in the degree of their championship of the protection of the public.

If we accept the examination as a fair and reasonable test of qualification for practice, the purpose of laying down any preliminary standards, other than character, to be met before admission to the examination, is obviously one based on practical considerations and on experience. If there were no tests at all, there would be hundreds of applicants taking every examination on the theory that there would be nothing to lose and much to gain,—the old American theory of "try anything once". The applicants who had conscientiously devoted themselves to a proper legal education would be a small minority as against those who had taken correspondence school courses, those who had picked up a smattering of law, incidental to experience

in some other calling, and thought the outside chance of passing was worth the small cost of the entry fee, those who had pursued the law-office method in letter but not in spirit (as discussed below), and many others. The task of investigating the character of such numbers, and of proctoring and correcting their examinations, would be tremendous and uncalled for, in comparison to the percentage of successful ones that could reasonably be foreseen.

Law Office Instruction Is Centuries Old

All that was (and is) needed was a reasonable guaranty that the applicant had prepared himself with sufficient seriousness to justify giving him a chance to show that he could meet the standards as exemplified in the examination. Experience, and experience alone, provided the criterion. The law office method had centuries of experience behind it, with scores of outstanding and successful lawyers and fine judges to justify its retention. But experience had also shown that the graduates of law schools having less than minimal scholastic resources and requirements were unlikely to succeed. Thus the requirement that an applicant, if not trained in a law office, be a graduate of a law school that had been investigated and approved, by recognized standards, was clearly justified. It is notable that no such inadequacy of the law office method existed to justify a change in the rule.

Let us examine the experience of the last two decades with regard to law office preparation for the Bar. The alternate method of study is obviously well grounded in reason: in order to be properly trained, a man must go through a training that is either theoretical or practical. If he goes to law school, he is instructed in theory (though very rarely in practice). If he does not do this, he can go to work in a law office, take a useful part in its production, see the wheels of the machinery turn, and learn by seeing and helping it happen, absorbing the theory by incidental study in his off hours. He learns by the apprentice system, and he usually knows more about how legal business is actually transacted than the highest-standing graduate of the best law school. And the percentage of those who pass the bar examination after a conscientious pursuit of the method has been higher, during the last quarter-century in New Haven County, *than that of the graduates of any approved law school.*

Old Rule Needed Clarification, Not Abrogation

The old rule required four years of study "while bona fide engaged" in an office engaged in the general practice of the law. If there has been trouble with the rule, it has not been with the method but rather with the interpretation of the rule itself. The rule needed clarification, not abrogation. It ought still to be available, even if seldom used, to the impecunious head of a family who discovers only after he has assumed the unavoidable responsibility of that family that he has both the qualities and the ambition to make a good lawyer.

In the last quarter-century in New Haven County, about eight persons have applied to take the bar examination after studying in this way. Of these eight odd, six have followed the letter but not the spirit of this rule. No one of the six has been admitted to the Bar. Here is what they have done. They have a friend or relative who is a lawyer. They persuade him to assign them a card table in the corner of the office and sit there for six hours or more a day, studying on their own initiative. There is no direct and regular supervision. For all practical purposes, they might just as well read law at home with complete independence. Yet they claim to have been "bona fide engaged" in a law office and they ask to take the examination. No wonder they fail! The rule, as to them, might well be abolished.

To me, however, the words "bona fide engaged" clearly mean "performing some useful function". Such an interpretation is consistent with the theory of an apprenticeship in the law. It carries out the spirit of the rule as well as the letter. Just as the law school student learns practice only incidentally to his theoretical training, the law office student learns his theory as an incident to his learning how to run the machine itself. The other two of the eight above mentioned followed this interpretation of the rule. They each passed the examination on the first attempt. Can any other law school claim 100 per cent success?

One of the two was a trial assistant in the legal department of the railroad. He saw the cases prepared, he heard the witnesses' stories in advance, he saw all the papers that had to be filed. The other started searching titles in a conveyancing office and later was transferred to the office to do work with which came an opportunity to see every function of the office actually operating. (At these times the rule did not specify that study be in the office of a general practitioner. It is indeed strange that the first whittling of the rule should be in the form of eliminating the type of office that had been producing the only successful alumni.) In the case of each of these men, he met once a week with a lawyer-superior in his office to discuss legal problems and the course of future study. He earned his living in the daytime and did his incidental studying of the books in his evenings at home, on the bus going to and from his work, on his Saturday afternoons and Sundays. In each case, when he began to study law he had a wife and one or more children to support, and economically was unable to suspend the earning of a living to go to law school. In each case, no one has questioned his qualifications to practice law since his admission to the Bar. The method, surely, has met the practical test at least as fully as the method still available.

To Retain Rule Would Cost Nothing

True, the method has been little used. It is hard to see how that can be a valid reason for its elimination under any circumstances now known. It would cost nothing to retain the rule. It has cast no undue burdens

upon the character committees except the little time required to investigate those who have not conscientiously carried out their preparation. Abolition of the old rule is the first step toward making admission to the Bar dependent upon the applicant's economic resources rather than upon his innate fitness. It can do no harm presently foreseeable to keep the method available to the man who needs to use it.

I spoke above of inconsistency in the championship of the protection of the public. During the war, the judges passed a rule making eligible for admission to the Bar any graduate (in or after June, 1941) of an approved law school who had served at least a year in the Armed Forces and who satisfied certain requirements of character, residence, and time of application. Here was certainly no reasonable relation between the established standards and the protection of the public against improperly trained lawyers. On the contrary, the year or more in the service usually resulted in the forgetting of a large part of what they had learned in law school, to say nothing of the lack of opportunity to keep in touch with the rapidly changing statute and case law. The first group of New Haven County applicants under this rule included two men who had taken the Connecticut bar examination before going into the service *and had failed.* The second group included men *who had failed twice* before entering the Army. Here were men who had actually demonstrated their inability to meet the standards of qualification; yet they were admitted to the Bar. It is hard to find any consistency in retaining the bar examination and at the same time admitting men who have unsuccessfully taken it while denying the right even to try to pass it to those who have prepared themselves by a method that is centuries old and that has met the test of experience. Surely, some substantial experience of an unfortunate nature, but not yet arisen, ought to be the sole basis for such a position, and not merely an unfounded prognostication that the office-trained lawyer will not pass the test.

It is time to be realistic about the matter. It is time to decide, with due deliberation, whether the test of the right to practice law is to be the passing of a bar examination or an examination of the educational record of the applicant. Let us not try to mix the two.

Charles M. Lyman is a practicing lawyer in New Haven, Connecticut. Admitted to the Connecticut Bar in 1928, he has taken part in many of the activities of the Association, including membership in the House of Delegates since 1938, and chairmanship of the Rules and Calendar Committee and of the Section of Bar Activities.

Though there are not absent dark pages in the history of the common law, it remains true that all through the centuries, the tradition of natural law never was fully abandoned in the history of the common law. It was the judges who, animated by the natural law, took on the guardianship of the law as a rule of reason and for reasonable free citizens, against absolutist kings and the threat of tyrannical majorities in the legislatures. Jurists and judges who are philosophically mere pragmatists and positivists cannot be the guardians of the natural rights because they have abandoned the sources from which these rights and their dignity are simultaneously derived—the natural law.

—Extract from "The Natural Law in the Renaissance Period," by Heinrich A. Rommen, an address before Natural Law Institute, University of Notre Dame, December, 1948.

The Lawyer Reference Plan:

Legal Service for Persons of Moderate Means

by Harold J. Gallagher • President of the Association

■ At the invitation of Reginald Heber Smith, Director of the Survey of the Legal Profession, more than thirty representatives of leading newspapers, magazines and radio networks assembled at The Plaza in New York on November 15, 1949, to hear announcements by Harold J. Gallagher, President of our Association, and by Mr. Smith.

The subject of the conference was the Lawyer Reference Plan. After pointing out that the American Bar Association had been on record in favor of the Plan since 1946, Mr. Gallagher disclosed that he had appointed as members of a Special Committee on Lawyer Reference Plans—William M. Wherry, New York, Chairman; Frank H. Boos, Detroit; George Bouchard, Los Angeles; David E. Bronson, Minneapolis; Alex Elson, Chicago; Andrew Pangrace, Cleveland; Theodore Voorhees, Philadelphia.

This committee, using the Survey's report on Lawyer Reference Plans, will foster their adoption and improvement in every city with more than 30,000 population and will promote the development of standards and uniform statistical methods.

Mr. Smith explained how the Survey of the Legal Profession came into being and what it was trying to do. (See 33 A.B.A.J. 1075; 34 A.B.A.J. 771; and 35 A.B.A.J. 748.) He said that the Lawyer Reference Plan report would be published in Chicago on November 22. The report, which is in the form of a manual for bar association use, has been distributed to the 1100 state and local bar associations in the nation. It is also being distributed to legal newspapers and periodicals, other organizations and individuals. It was the subject of an article in the December, 1949, issue of the *Journal* (35 A.B.A.J. 979) by Associate Justice Robert H. Jackson of the Supreme Court of the United States.

On the evening of November 21, President Gallagher delivered the following address explaining the plan over a coast-to-coast network of the Columbia Broadcasting System.

■ Today millions of persons of moderate means need legal assistance in innumerable ways that confront them in their daily lives. They need to draw a will, to have an estate settled, to purchase a home or to make a lease of property, to file an income tax return or settle a dispute. Then again, many times they require legal advice without realizing that fact. Oftentimes these people could save themselves countless dollars and countless heartaches if they had consulted a lawyer to aid them in their problems. They have not done so probably because first, they were not personally acquainted with a lawyer; second, they did not know how to get into contact with one they felt could properly handle their little business, and third, they feared that the cost of obtaining such legal advice would be too high for them to pay.

That the organized Bar should do something to make it possible for such persons to obtain competent legal advice on reasonable terms became apparent. That is why in a spirit of public service, we are doing something about it now. I shall tell you about it.

A little over a year ago, Mr. Frank Holman, then President of the American Bar Association, spoke over the Columbia Broadcasting Network about "The Survey of the Legal Profession", which had been begun only a few months before by a distinguished council of prominent lawyers and laymen working under the direction of a director, Reginald Heber Smith, of the Boston Bar, for many years an active leader in the American Bar Association, and known throughout the country as a pioneer of legal aid work in the United States. He mentioned the fact that one of the studies being made for the Survey showed that there is a tremendous but largely

unrealized need for legal assistance in both the middle and lower income groups, particularly of the preventive sort. I am sure that the person of moderate means can save money and heartache by consulting lawyers. I am certain too that *preventive* legal advice is as sound in principle and as necessary in fact as preventive medical advice.

Survey's Manual Explains Plan

There is today a shocking misapprehension of what a lawyer does and what he is likely to charge. The report made by the Survey further shows that three out of five middle income families and only two out of five lower income families were found to use the lawyers' services in cases where such services were definitely needed. The Survey has now completed a manual which will be released November 22 for use by all state and local bar associations everywhere in putting into effect in their own community a plan whereby a person of moderate means may be referred to a competent lawyer who will serve him at a moderate fee. This plan is known as the Lawyer Reference Plan.

In 1946 the American Bar Association House of Delegates, representing not only the members of that Association but also the members of every state bar association, and the members of the larger county and city bar associations who were represented in the House of Delegates, authorized the Association to sponsor legal referral plans and low cost legal service methods for the purpose of achieving the fundamental duty of the Bar to see to it that persons requiring legal advice shall be able to obtain it irrespective of their economic status.

Plan Is in Operation in Twenty-Nine Cities

The Legal Aid Society throughout the country provides legal services for the poor who cannot afford to pay anything for the service.

Most of the citizens of the United States are in the middle income group and are able to pay moderate fees for legal services as they do for medical services. To make such services available, a promising plan has been developed by the Bar. This plan is no dream or theory. It is in active and successful operation in twenty-nine cities located all over the entire United States. New York, Chicago, Philadelphia and Los Angeles have very fine plans already in operation.

Press Conference on Lawyer Reference Plan. (Left to right) Charles O. Porter, Assistant to the Director of the Survey of the Legal Profession; Reginald Heber Smith, Director of the Survey; President Gallagher; William Dean Embree, chairman of the special committee that established the Lawyer Reference Plan in New York City.

How does the plan work? If you are one of the millions in the middle income group who have never consulted a lawyer and you feel the need of such a service, and live in one of the cities in which this plan is in successful operation, you may go to the bar association headquarters in your community, and pay a small registration fee of one dollar perhaps, and sit down with an able and experienced lawyer to talk over your problem. This person, as soon as he finds you have a legal problem, arranges for you to see and consult one of the lawyers on the bar association's reference list. It is interesting to note that 80 per cent of the persons coming to the referral plan attorney have never been before to a lawyer, and that 86 per cent of those who have legal problems can have such problems disposed of without litigation by following the legal advice given by such attorney.

Reference Attorney's List Open to All Lawyers

The reference attorney's list is compiled by the bar association and is open to all lawyers in good standing. The listed lawyers agree to charge a flat fee, usually only three or five dollars, for the first conference. This means you know in advance what your first session with a lawyer is going to cost you. Any other fees for further work are to be discussed by you and the attorney to whom you are referred. You have every opportunity to know in advance exactly what your costs will be, and any dispute as to fees will be settled by the bar association sponsoring the plan.

Assuming that your problem requires the close attention of a lawyer, the reference attorney selects a qualified lawyer on his list—I say "qualified" because some lawyers are

specialists and some do not handle certain kinds of cases. After the reference attorney gets the name, he immediately calls the lawyer on the telephone in your presence and makes an appointment for you. Usually the appointment is made for the same day, the same morning, the same afternoon, or even the same hour. Once the reference is made, the usual attorney-client relationship exists. There is no change in this relationship. Thus this plan has a decided advantage to both parties—to the client because he knows to the penny what the consultation will cost him—and to the lawyer because he gets a client he would not have had otherwise.

Briefly, that is how the plan works with a few variations here and there in twenty-nine American cities today.

Quotes Definition of Plan by William Dean Embree

William Dean Embree of the New York Bar, a former President of the New York County Lawyers' Association, and a leader in legal aid work, and in this lawyer reference movement, has defined the Lawyer Reference Plan in these words:

> An agency through which a member of the general public can be referred to a competent and reliable lawyer who for a fixed, moderate fee will be willing to give a consultation on a legal problem and then render additional legal service for a moderate fee if further legal service seems desirable and necessary.

In Philadelphia, an average of more than 150 cases a month are currently being referred in the fashion I have just described. New York, Chicago and Los Angeles refer almost as many.

Why is the Lawyer Reference Plan important? I think it is important because a great amount of damage and despair could be prevented by timely legal advice. I know this from my personal professional experience, and any lawyer you know will very likely tell you the same thing. Mr. Justice Jackson of the Supreme Court of the United States once wrote in an opinion:

> It is too often overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs.

As President of the American Bar Association, I have just appointed a special committee to promote and to improve Lawyer Reference Plans throughout the United States. The chairman of this committee is William M. Wherry, an outstanding member of the New York City Bar. Mr. Wherry once wrote as follows:

> The Lawyer Reference Plan would meet four objections now directed against the Bar. It would be an answer to the charge that the Bar Associations are indifferent to the needs of people with small incomes and do nothing to assist them in getting good legal service. Secondly, it does provide careful screening so that the consultants can be pretty well assured that the lawyers to whom they are referred can be trusted. Then, too, it assures the consultant that he will not be referred to a lawyer unless he has a problem requiring the services of a lawyer. Finally, the plan also emphasizes the need of specialization among lawyers.

Mr. Wherry's committee will be tremendously assisted by the report I have already mentioned on "Lawyer Reference Plans" published by the Survey of the Legal Profession.

Mr. Smith, the Director of the Survey, wrote as follows in the Introduction for the Lawyer Reference Plan Report:

> The Lawyer Reference Plan, if fully developed, may prove to be an outstanding contribution by the organized bar to a more perfect attainment of our American concept of democracy.
>
> We know that the only alternative to tyranny on the one hand and to anarchy on the other is the rule of law. We know that laws are not self-enforcing and that they depend for their efficacy on an impartial administration of justice. Finally, we know that if citizens are to obtain the equal protection of the laws, they must have the advice and assistance of lawyers.

The Lawyer Reference Plan presents the best method by which a vast number of our citizens living near large cities can obtain this advice and assistance at moderate cost.

While I am not familiar with the precise form of the Lawyer Reference Plan adopted in each community, I am sure that if it is sponsored by the local bar association it is worthy of your confidence. The local bar associations in cities of over 30,000 population where such plans do not now exist, will, I trust, promptly take the necessary steps to set up their own Lawyer Reference Plans.

The American Bar Association invites every lawyer in the country to participate in a great public crusade of the legal profession, which has for its goal the happiness and prosperity of all people.

The substance is vital. Our generation will not be granted the time to proceed at a leisurely pace. The enemies of our institutions are known; they are pressing the attack and our response must be swift. We know the answers. Let lawyers everywhere proceed to carry out the obligations to their profession.

Thus the contents of the law of nature vary with the ages, but their aim is constant, it is justice; and though this species of law operates not in positive enactments, but in the minds of men, it is needless to urge that he who obtains command over minds will in the end master their institutions.

—Sir Paul Vinogradoff, *Common-Sense in Law* (Home University Library), page 245.

Jurisdictional Conflict in Labor Law:

State Boards versus the National Board

by David L. Benetar • of the New York Bar (New York City)

■ The function of a governmental agency in the labor field, Mr. Benetar notes, is to quiet controversy. The conflict of jurisdiction between the National Labor Relations Board and the various state boards actually has the opposite effect, he finds. After analyzing the cases that demonstrate the problem, Mr. Benetar proposes a means for its solution. This article is a valuable contribution about a problem that has received little attention aside from the cases themselves.

■ Rivalry is the expected order of the day in the field of labor relations. Labor laws are designed to order and control contests between different unions for the support of the same group of workers. But rivalry between the labor boards of various states and the national board was not contemplated by law. The supremacy of the federal law, and of the national board which administers it, has been declared by the United States Supreme Court, *LaCrosse Telephone Corporation* v. *Wisconsin Employment Relations Board*, 336 U.S. 18 (1949). Yet, as the national board broadens exercise of its superior rights, there is a noticeable resistance to the consequent loss of jurisdiction by the state boards. The situation calls for correction. Perhaps the first step in this direction is that it be clearly recognized and understood.

Scope of Federal Jurisdiction Is Very Broad

The Labor Management Relations Act of 1947 grants jurisdiction to the National Labor Relations Board over employers engaged in interstate commerce and over those whose businesses affect such commerce. The effect on commerce exercised by any single employer need not be great. The act does not depend on any particular volume of commerce affected more than that to which the courts would apply the maxim *de minimis*, *National Labor Relations Board* v. *Suburban Lumber Co.*, 121 F. (2d) 829; *cert. den.*, 314 U.S. 693, at page 832 of the Federal Reporter, adopting the rule enunciated in *NLRB* v. *Fainblatt*, 306 U.S. 601, at 607.

In this regard, the law is no different from its predecessor, the Wagner Act of 1935. In practice, however, the national board has made increasing use of the total potential of its jurisdiction.

More and more businesses which in the past were considered local in character, and therefore subject to state labor regulation, have been brought within the ambit of federal regulation. Some examples of businesses which on their face would seem to be strictly local, but over which the National Labor Relations Board has assumed jurisdiction, are: an automobile sales agency, building construction, cottonseed processing, a department store, a laundry, a local bus company, maintenance of grounds and buildings, marine engineering and drafting, oil storage terminal, printing company, restaurant at airport, state bank, taxicab company, tire recapping company, utility, vendor of reconditioned automobile parts. The respective cases in which these businesses were involved are listed below.[1]

Even where the national board has rejected jurisdiction over a local enterprise, it has done so in the exercise of discretion, rather than for the lack of power.[2] The jurisdiction of the national board in light of the statute and of these authorities has come to be recognized as so all-inclusive that only recently General Counsel Denham, when asked whether he could name any business which would be

1. *M. L. Townsend*, 81 NLRB 122 (1949); *Electrical Workers, A.F. of L.*, 82 NLRB 132 (1949); *West Texas Cottonoil Co.*, 73 NLRB 645 (1947); *Whitney's Department Store*, 73 NLRB 1245 (1947); *New York Steam Laundry*, 80 NLRB 242 (1948); *Amarillo Bus Co.*, 78 NLRB 158 (1948); *Roane-Anderson Co.*, 71 NLRB 30 (1947); *Franque A. Dickens*, 64 NLRB 797 (1945); *American Republics Corp.*, 74 NLRB 156 (1947); *DeMay's Inc.*, 81 NLRB 225 (1949); *Air Terminal Services, Inc.*, 67 NLRB 90 (1946); *Northern Trust Co.*, 69 NLRB 82, 56 F. Supp. 335, *affirmed* 148 F. (2d) 24, *cert. denied* 326 U. S. 731 (1945); *Taxicabs of Cincinnati*, 82 NLRB 72 (1949); *Lewis Tire Service Co.*, 62 NLRB 531 (1945); *Consolidated Edison Company of New York, Inc.* v. *NLRB*, 305 U.S. 197 (1938); *Earl McMillian Co.*, 81 NLRB 114 (1949).

2. "From this, we believe it reasonable to infer, in the absence of any convincing evidence to the contrary, that Congress intended the Board

exempt from national board jurisdiction, answered that he could not think of many cases outside the farmer who milked his cows and sold the milk down the road (*New York Times*, June 20, 1949).

The Federal Court of Appeals for the Fifth Circuit, at Houston, Texas (in a case involving jurisdiction over a small public service company in Texas), expressed a similar view.[3]

Finding of Federal Jurisdiction Excludes State Boards

Moreover, once national board jurisdiction is found to exist over any employer, or even over the industry in which such employer is engaged, the finding excludes the coexistence of jurisdiction in any state labor board, *Bethlehem Steel Company* v. *New York Labor Relations Board*, 330 U.S. 767; *LaCrosse Telephone Corporation* v. *Wisconsin Employment Relations Board*, 336 U.S. 18.[4]

The transcendent and exclusive quality of federal jurisdiction makes it impossible for the national board to cede jurisdiction to a state board simply by declining, in its discretion, to exercise its own jurisdiction. Indeed, it has been recognized by the chairman of the national board that discretionary declinations of jurisdiction by that board may result in a stalemate of action by either board.

> If the Congress should be dissatisfied with the agency's ultimate action in exercising its commerce jurisdiction, it might decide that legislative guidance was desirable. In considering this problem, Congress may also desire to reappraise the language of Section 10(a) of the present Act, which bars the National Board from ceding jurisdiction over relatively local controversies to State Boards unless they are enforcing legislation substantially identical with the Federal statute. Because no States have chosen to enact such legislation during the current year, we have found it impossible to cede cases to State tribunals that have been accustomed to handle them in the past. *There is considerable danger of creating a no-man's-land, especially if the National Labor Relations Board decides to refrain from exercising its own jurisdiction to the hilt.* [Statement of Chairman Herzog, reported at 22 LRRM 57.]

The possibility of the existence or creation of such a vacuum has undoubtedly sharpened the responses of state labor boards to claims in particular cases that particular businesses were so clearly local as to justify action by the state boards, even where these local businesses exerted a discernible effect on interstate commerce. Yet the Supreme Court has made clear that the national law is intended to preclude state boards from extending their facilities to firms over which the national board has jurisdiction, even where it has failed to exercise such jurisdiction.

> *Since the employers in question were subject to regulation by the National Board, we thought the situation too fraught with potential conflict to permit the intrusion of the state agency, even though the National Board had not acted in the particular cases before us.* [*La Crosse Telephone Corporation* v. *Wisconsin Employment Relations Board*, 336 U. S. 18. Italics added.]

At first blush, it may seem that the various factors described above are combining to produce an impossible situation. The situation, however, is not impossible. It is difficult. But it is not without reason or remedy.

National Board Has Power To Cede Jurisdiction

The national board has express power to cede jurisdiction to state boards in proper cases and under appropriate circumstances. The power, although restricted, clearly exists.[5] The national board has rightly decided, however, that it is without power to cede jurisdiction to a state board, even over an essentially local business, where the state statute is inconsistent with the national act, *Kaiser-Frazer Parts Corporation*, 80 NLRB 158.

From the section of the law governing cession agreements, it seems clear that the intent of Congress was not to preëmpt the field of labor relations for federal supervision. Rather, it was to make certain that the national labor policy as embodied in the federal law should be extended throughout the nation to the furthest reaches of the federal power. A complete ouster of state regulation was neither intended nor accomplished. What was intended, and what is gradually being accomplished, is the elimination of conflicts between federal law and the laws of the various states. Disagreement as to the wisdom of the law itself should not obscure the soundness of this effort toward uniformity.

The process of unifying the labor law of the country is naturally a painful one. It is particularly painful in a field so provocative of such widespread and deeply felt difference of opinion.

The present represents a difficult period in the evolutionary process which we have been discussing. Before looking ahead to the ultimate

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to continue to have *discretionary* authority to decline to exercise these powers in appropriate cases, as it had under the Wagner Act. The Board can now exercise this discretionary authority only by dismissing a complaint. We have therefore dismissed complaints—as we have declined to proceed with representation cases—when, in our opinion, the assertion of jurisdiction would not effectuate the policies of the Act." *Matter of Walter J. Mentzer*, 23 LRRM 1570. (Italics added.)

3. "It is true as respondent urges that its business is largely, indeed almost entirely, intrastate and that disturbances in connection with its business could have but little direct effect on interstate commerce. . . . *But the question before us is not one of the wise exercise of, but of the existence of, power, and upon that issue it cannot be maintained upon this record, that such disturbances could have no direct effect.*" *NLRB* v. *Gulf Public Service Company*, 116 F. (2d) 852, 857. (Italics added.)

4. It is true that the Supreme Court in *Algoma Plywood Co.* v. *Wisconsin Board*, 336 U. S. 301 (1949), upheld the jurisdiction of the Wisconsin board to prosecute an unfair practice charge against a firm clearly engaged in interstate commerce. The charge in that case, however, was under a portion of the statute which was found not to conflict with the national law, and which covered a subject not covered by the national law, *viz.*, a requirement that a two-thirds vote is needed to authorize a maintenance of membership agreement. The Pennsylvania Supreme Court emphasized this fact in *Pennsylvania Board* v. *Frank*, 24 LRRM 2216 (1949), wherein it construed the *Algoma* case to apply only where the state law covered a matter not governed by the federal law; and held that case not to apply where the state statute *paralleled* the national act.

5. Section 10(a) of the Labor Management Relations Act of 1947, provides: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

outcome of that process, or even to the intermediate means of easing it along, the situation as it exists today should first be sharply outlined.

Finding the Limits of State and National Jurisdiction

We have seen that the law does not give a party seeking relief from a labor board his choice in the selection of the board to which he may apply. If the business involved is one over which the national board has jurisdiction, that board alone may act in the absence of a cession agreement.[6]

While on its face this principle seems perfectly clear, doubt and ambiguity lurk beneath its surface. This latent uncertainty arises from the absence of any clear-cut test to determine whether in fact the national board has jurisdiction in any given case. In some cases, of course, the facts so clearly dictate the answer that no real problem is presented. In others, however, arguments can be made and inferences drawn to support opposite views. It is in these situations that jurisdictional conflict can arise and has arisen.

The occurrence of such conflict is encouraged by the existence of basic differences between the provisions of the national law and those of the various states. One of the most significant of these differences relates to the filing of anti-Communist affidavits by union officials. The national law requires these affidavits as a prerequisite to access to the board. No state has as yet imposed this condition on the use of its labor board facilities. To a union which has not filed such affidavits, the haven of a state board beckons invitingly. The incentive for such a union to seize upon any fact and wring it dry of all possible inferences supporting state board jurisdiction is clear.

Confronted with a union claim that it has jurisdiction and a company claim that it has not, the state board is placed in an awkward position. Its decision must necessarily be based on a determination whether the case properly belongs at the national board. It must, therefore, as a purely state agency determine the jurisdiction of a federal board by construing the application of a federal statute to the facts presented before it. In the course of doing so, it must evaluate not alone federal court decisions, but decisions as well of the very agency whose jurisdiction it is defining.

It is, of course, the duty of every state board to exercise jurisdiction in the strictly limited class of cases where such jurisdiction truly exists. If, however, in a doubtful instance it sustains its own jurisdiction, the matter may go through all of the courts of that state, and indeed finally to the United States Supreme Court where its jurisdictional finding may ultimately be reversed. Two of the cases previously referred to in this article (*Bethlehem Steel Company* v. *New York Labor Relations Board*, 330 U.S. 767, and *LaCrosse Telephone Corporation* v. *Wisconsin Employment Relations Board*, 336 U.S. 18) are instances where this actually occurred. When this occurs, of course, the state board, so far from helping the petitioner who has invoked its jurisdiction, has in fact done him, the respondent, and the state, a great disservice. For it has subjected the parties and the public treasury to a waste of time, effort and money.

If State Declines Jurisdiction, It Surrenders Control

The other horn of the dilemma confronting state boards in cases of the kind under discussion is no more inviting. In every case wherein a state board declines jurisdiction, it is thereby surrendering control to the national board, not alone of the particular case, but of every case in that industry. This is an act of self-destruction of its own case-load and volume of business.

Confronted with these alternatives, the tendency has appeared for state boards to uphold their own jurisdiction. This tendency has led to litigation. In New York, Wisconsin and Minnesota, parties have sought and obtained injunctions against state labor boards which have acted in excess of their jurisdiction. *LaCross Telephone Corporation* v. *Wisconsin Employment Relations Board*, 336 U.S. 18; *Bethlehem Steel Co.* v. *New York Labor Relations Board*, 330 U.S. 767; *Linde Air Products Co.* v. *Johnson* (D.C., Minn.) 77 F. Supp. 656. In a Pennsylvania case where such an injunction was sought, the court upheld the sufficiency of the complaint, *International Association of Machinists* v. *Smiley* (D.C., M.D. Pa.) 76 F. Supp. 800. In Pennsylvania and in Wisconsin, the courts have denied enforcement of state labor board orders directed to employers over whom they were without jurisdiction, *Wisconsin Employment Relations Board* v. *Plankinton Packing Co.*, 23 LRRM 2287; *Pittsburgh Railway Company* v. *Division 85 of Amalgamated Association of Street Railway & Motor Coach Employees of America*, 357 Pa. 379.

In at least one reported instance, the national board itself brought an injunction action against a state board, *NLRB* v. *Industrial Commission of Utah* (D.C., Utah) 22 LRRM 2294, to restrain the latter from invading the field of the former's jurisdiction. The case was one of those

David L. Benetar, a member of the New York Bar, has specialized in labor relations since 1937. During the war, he served as principal mediation officer for the National War Labor Board, and has served as mediator and arbitrator in the settlement and decision of many labor disputes.

6. Except only in the strictly limited class of cases typified by *Algoma Plywood Co.* v. *Wisconsin Board*, *supra* note 4.

where a union which had failed to comply with the anti-Communist affidavit provisions of the national law sought to avail itself of state board facilities. The state board in that instance insisted on its right to proceed with the union's petition, despite notification by the national board of the fact that it (the national board) had sole and exclusive jurisdiction. The court granted the injunction.

A certain amount of conflict of jurisdiction between state boards and the national board is probably inescapable. It can, however, be minimized. The various state boards and the national board have it within their power materially to advance the accomplishment of this result. State legislation is needed to pave the rest of the way.

Suggested Program for Minimizing Jurisdictional Conflicts

A first step toward improving the existing situation could be taken at once by coöperative action between the labor boards of the states and the national board.

1. Close liaison could be established between the national board and the boards of each state for the handling of any questions of conflict of jurisdiction. This could be accomplished by the designation of staff members of the respective agencies to confer in all cases of this kind. The jurisdictional facts as developed in questionnaires and informal conference (already in use at the national board and at least some state boards) could be jointly reviewed. In the hands of skilled and experienced representatives, a joint administrative decision after hearing both parties could be speedily made in most cases. Likewise in most cases, the conclusions reached in conference would be accepted by the parties. In the relatively few where they were not accepted, all contest between the labor boards themselves would be eliminated from any ensuing litigation. The boards would present a unified view to the parties and to all reviewing courts as to where they both believed jurisdiction to lie.

Of course, under any such plan as we have suggested, there is the possibility of disagreement between boards. In particularly difficult borderline cases, this cannot be entirely avoided. Such disagreement, however, can and should be limited to the relatively few unavoidable instances. The national board, already handling an abundance of cases, surely will not be anxious to reach out for more than the sweeping provisions of the federal law already give it. The state boards, on the other hand, if properly mindful of the sharp limitations of their scope, will not make futile attempts to broaden their scope by administrative decision when legislative action is needed.

The second step essential to achievement of the ultimate objectives of the national law rests in the hands of the legislatures of the states which have created labor boards of their own.

2. The legislatures of the states which have enacted labor laws of their own might well give serious consideration to conforming those laws to the national act.

In such action lies the only sound solution of the problem we have been discussing. Conforming state labor laws would at once open the way for cession agreements between national and state boards.

Such action would remove all reason for parties to color their positions and arguments on jurisdiction in an effort to secure the benefits or avoid the effects of an applicable provision of state or federal law. Above all, it would relieve the present unenviable position of the state boards by permitting them to function over local business free from concern over the growing loss of case-load to a national board which in many instances neither wants nor accepts it.

The possibility of strong and even heated resistance to the notion of using the Taft-Hartley Law as a statutory model has not been overlooked. An objective appraisal of the soundness of such resistance would lead us far afield of our original theme. Without such an appraisal, however, enough may be said to support our recommendation.

From the lengthy congressional debates over the attempt to repeal the Taft-Hartley Law, there emerged considerable general agreement as to certain of its provisions.[7] Thus, the anti-Communist affidavit requirement, the free speech guarantee, and the specification of the duty of unions to bargain collectively, were eventually recognized by Administration supporters as worthy of perpetuation.

If the conforming process were confined to these three points, plus the adoption of the fiscal and financial-filing provisions, which have never been heatedly controversial, it would open the way at least for limited cession agreements. The federal restriction on such agreements is that they be not made if the provision of the state law applicable to the case at hand is "inconsistent with the corresponding provision of this act or has received a construction inconsistent therewith." Under this language, cession agreements would be authorized in all cases where the particular provision or provisions of state law involved were in conformity with the federal statutes, even though the remaining provisions of the labor law of that state differed from the federal law.

As the passage of time and the results of Congressional elections disclose more clearly the ultimate form of our national labor law, states which hesitate at this time to make more fundamental changes in their statutes may be guided accordingly.

In the end, the federal statutory scheme must prevail. Nonconformity by the states over the long term can only result in sharply restricting the scope and effectiveness of their own labor boards.

The function of the government agency in the field of labor relations is to quiet controversy. When instead it engenders controversy, whether in defense of jurisdictional boundaries or otherwise, it defeats the very purpose for which it was created. No effort is too great to avoid this result.

7. Sections 9(f) and (g) of the Labor Management Relations Act of 1947.

The English Legal Assistance Plan:

A Description of Its Machinery

by Robert D. Abrahams • of the Pennsylvania Bar (Philadelphia)

■ This is the second report by the Survey of the Legal Profession on the English Legal Aid and Assistance Plan which became law in July, 1949. Robert D. Abrahams, of the Pennsylvania Bar, founder of the Neighborhood Law Offices in Philadelphia, spent the summer in England and learned at first hand the Law Society's plans for implementing the law and bringing it into practical operation.

After the Legal Assistance Offices come into being in July, 1950, the Survey will prepare a third report describing how the plan works, the number of persons seeking assistance, the number of barristers and solicitors who have voluntarily enrolled to participate in the plan, and what effect the plan has on the general practice of law.

■ This report is intended as an eye witness' interim commentary on the progress of the English legal assistance plan. It is intended to supplement the article of Reginald Heber Smith entitled "The English Legal Assistance Plan: Its Significance for American Legal Institutions", which appeared in the June, 1949, issue of the AMERICAN BAR ASSOCIATION JOURNAL (35 A.B.A.J. 453). It assumes that the reader has read that article and therefore has a knowledge of the mechanism and philosophy of the English Plan.[1]

Parliament passed the Legal Aid and Advice Bill on July 7, 1949, and the Plan will begin to serve the public on July 1, 1950.

Near the end of the parliamentary procedure, there was one strenuous attempt made to amend the Plan in a vital aspect. This was an effort, apparently inspired by leftist members of Parliament, to place *laymen* in positions of authority in the Plan. This attempt received considerable support from the general public. The sponsors of the Plan, however, were adamant on this point. They insisted that to amend the Bill in such a fashion would be to open the door to lay and perhaps political domination of the legal profession.

The Law Society, which is an almost all-inclusive association of English solicitors, is reported to have told the Lord Chancellor that if the Plan were amended in this manner, the members of the Law Society would not participate in the Plan's supervision or serve on the panels. This firm stand by the Law Society resulted in the failure of the amendment and the enactment of the original Plan intact. All persons in authority in administering the Plan, therefore, will be members of the legal profession.

This vigorous and forthright attitude on the part of the Law Society is indicative of the strength and resolution of that Society and of the great part it will play in the direction of the Plan.

Lawyers Do Not Expect Political Domination of Bar

I was given every opportunity this summer to observe the preparations for the Plan, which are now in full swing in Great Britain. I spent considerable time with Thomas G. Lund, the General Secretary of the Law Society, and also met and interviewed on the subject of the Plan many other lawyers, both solicitors and barristers. These interviews included some with lawyers who had been most active in attempting to

NOTE: This article is a report prepared for the Survey of the Legal Profession.

The Survey is securing much of its material by asking competent persons to write reports in connection with various parts and aspects of the whole study.

As reports in some fields of the Survey will require two years or more, the Survey Council has decided not to withhold all reports until the very last has been received but to release reports *seriatim* for publication in legal periodicals, law reviews, magazines and other media.

Thus the information contained in Survey reports will be given more promptly to the Bar and to the public. Such publication will also afford opportunity for criticisms, corrections, and suggestions.

When this Survey has been completed, the Council plans to issue a final comprehensive report containing its findings, conclusions, and recommendations.

1. The reader is also referred to a preliminary report on the English Plan in the May, 1947, issue of the *Journal* (33 A.B.A.J. 445), and to a letter published in the September, 1949, issue (35 A.B.A.J. 781).

amend the Plan. I made an effort to sense the feeling of the British lawyers by asking them, "How do you feel about the governmental grant to be used to pay legal fees under the Plan? Will it not lead to governmental domination of the profession with consequential harm to the public interest?"

There did not seem to be much feeling on the part of English lawyers that such a governmental grant will lead to political domination of the legal profession by the government. One eminent lawyer pointed out to me that in many states of the United States, including my own state, Pennsylvania, the legislature for many years has been making grants to hospitals in order to provide care for persons who cannot pay. He had not heard, he said, that such grants were followed by political pressure upon the hospitals for appointments to their medical staff or any other interference with the medical profession. Why, then, expect such pressure when it is the legal profession rather than the medical which is involved?

Another said, "The government appoints the judges, doesn't it? Many barristers wish to be judges, but this has not made the barristers subservient to the government in their professional service to clients. Why, then, should a governmental subsidy to the profession as a whole induce any such servility?"

Those English lawyers who expressed reservations concerning the Plan did not seem so much concerned with the governmental subsidy as with the possibility that unworthy persons might be served under the Plan or that people who are eligible for service under the means test would consult solicitors too frequently and engage in needless litigation. It is true that to take the time of English lawyers with trivial problems and useless litigation might mean that much time less for more important problems, inasmuch as the profession is much smaller than it is in the United States. There are only 16,000 solicitors and 1,200 barristers in England serving a population of 40,000,000. In the United States we have nearly twelve times as many lawyers to serve four times the population.

Some barristers feel that a result of the Plan may be to abolish the difference between the professions of solicitor and barrister. Agitation in that direction is under way but seemed to me to be coming from outside the Law Society rather than from within it.

Mr. Lund is Individual Force Behind the Plan

Mr. Lund has been well pointed out in Mr. Smith's article as the individual force behind the Plan. He is indeed that. He has a rare combination of talents, for he is both a pioneer and practical planner. Undoubtedly the Plan is mainly his conception, and certainly the manner in which the Plan came through Parliament unchanged is due to his technical skill in steering a course between the extreme right and the extreme left. He impressed me as a man of the utmost integrity who is determined to provide a legal service for the section of the population that has previously gone unserved, while at the same time preserving the independence of the profession.

Most of the solicitors interviewed were in favor of the Plan. Some barristers favored it, but others expressed reservations. The solicitors are accustomed to work in an organized fashion. The Law Society is powerful. It has seven hundred employees to take care of its regular business, exclusive of those who will be employed in connection with the Plan. It conducts the law school which persons wishing to become solicitors attend. It provides many services for members, including research on difficult legal problems. I had the pleasure of dining in its restaurant on several occasions, and also visited the charming Georgian house that is given to the President of the Society as his official residence while in office.

The barristers, unlike the solicitors, appear to be very loosely organized up until this time. Although each barrister owed allegiance to one of the Inns of Court there was no general association of barristers. This year, for the first time, each of the barristers in Great Britain has been asked to contribute five pounds in order to employ a secretary for a barristers' association so that the barristers may be kept acquainted with the progress of the Plan and may act as a group where necessary. I was informed that some barristers object even to this mild regimentation.

It is said that some barristers believe that the tendency of the Plan will be to reduce their business, because clients who consult solicitors under the Plan will not ask that more than one barrister be briefed on their behalf as is sometimes the case where a wealthy client consults a solicitor in a matter involving litigation.

Area Committees Attracting Highest Type of Lawyer

At present, the Plan has reached the practical stage where the Area Committees have been appointed. Mr. Lund is much encouraged by the type of men who have accepted service on these committees, which are responsible for the practical administration of the Plan. It would seem that they will be representative of the leaders of the profession and will consist of men of the highest competency and reputation.

The Law Society is actively preparing to open a school for the solicitors who will be employed in the Legal Advice Centers. The curriculum for the school has been prepared, and a three-month course will be required of each solicitor who is to be employed in these centers or who will be employed full-time for the Plan. This course will stress the particular fields in which it is likely that advice will be most often sought.

Because some of the Advice Centers will be in rural districts where the lawyers will not have ready access to law libraries, the Law Society will maintain a research office equipped to do legal research for the men in the field.

My general impression is that when the Plan begins to offer service

to the public in July, 1950, it will open as completely equipped as would a new department store and will need the same promotion; that is, the public will have to be told where and how to find the advice centers and how to go about employing the solicitors of their choice.

The public heartily wants the Plan. It is believed that 25 per cent of the litigation or "court business" of England will be done under the Plan. It is further believed that operation of the Plan will result in much preventive legal work being done which now goes undone and will also result in better public relations between the lawyers and laymen.

Mr. Smith, in his article, pointed out the danger of comparison of English legal institutions with our own, because the words we use, while in the same language, often have a different meaning. It would be dangerous to draw an analogy between the English Plan and anything on the American legal scene.

English Plan Dwarfs Our Legal Service Endeavors

All of our American endeavors in legal service—our Lawyer Reference Plans, Neighborhood Law Office Plans and legal aid organizations—are dwarfed by the size of the English Plan. It was inspiring to see the effort that has been made by the English lawyers in this respect. Many of these lawyers have most uncomfortable quarters because of the great damage to London during the war. When you visit a barrister's chambers in the Inner or Middle Temple you are likely to find that your host has possession of a single usable suite of offices surrounded by a collection of cellars and bombed-out buildings. Yet, it seems that men practicing under such conditions are willing to give their time and energy to plan for the future of their profession rather than to spend their time bemoaning past losses and present discomforts.

There will be many American lawyers who will not agree with the philosophy of the British Plan, especially with the idea of subsidizing the service by governmental grant to the extent that the Plan is not self-supporting, even where such grant is administered by the bar association. If each lawyer could visit London and speak to the lawyers who are responsible for the new service, there would be none who, agreeing or disagreeing with the objective, would not come to admire the courage and enterprise of the English lawyers in undertaking the Plan at this time. It seems to me that the British Plan, within the limits of its philosophy, has been well conceived, will be well set-up and will succeed in bringing a needed service to the public. It probably will be satisfactory to most of the lawyers who participate.

It must be noted, however, that if this Plan succeeds, it will have tremendous repercussions on the American legal scene. At once there will be agitation to imitate it here. When that time comes, it will be well to remember Mr. Smith's admonitions concerning the differences in terms. We can and should learn much from what our brethren in England are doing. We must ensure competent legal service to all who need it and realize that our profession has an obligation in return for its monopoly. We should also remember in the inevitable discussion in the United States that will follow the opening of the British Plan that we should progress from the point where we now are and go forward in our own American way as the English lawyers are going ahead in an English way.

We Have Successful Experiments as Guides

We must not forget that we already have in the United States a good beginning for bringing legal service to persons of modest means. Some of our experiments, such as the Neighborhood Law Office Plan, seem to have shown that if that element of our population that cannot pay for lawyers at all is served as a charity by Legal Aid Societies, the element above such Legal Aid groups can be served profitably and without subsidies, governmental or otherwise; and in Lawyer Reference Plans it is being demonstrated that this type of service can be supported by the bar associations themselves without seeking governmental subsidies. It must also be remembered that in England legal aid work was in a very rudimentary stage before the war and there are no Lawyer Reference Plans or Neighborhood Law Office Plans in operation there.

However, this report is not the place for a discussion as to how far the English Plan should be imitated in the United States, when and if it succeeds. At this time, it is fitting only to observe and to applaud the magnificent effort of the English lawyers in what is bound to be one of the greatest experiments in legal history.

Robert D. Abrahams is a practicing lawyer in Philadelphia, Pennsylvania. He received his LL.B. from Dickinson College at Carlisle, Pennsylvania, and was admitted to the Pennsylvania Bar in 1926.

EDITOR'S NOTE: After this issue had gone to the printer, Prime Minister Attlee stated in Parliament that most of the Legal Aid Plan would have to be at least postponed indefinitely. On November 15, Mr. Smith cabled Mr. Thomas G. Lund, secretary of The Law Society, as follows:

American Bar Journal publishing

(Continued on page 45)

"Books for Lawyers"

LIFETIME AND TESTAMENTARY ESTATE PLANNING. *By Harrison Tweed and William Parsons. Published by Committee on Continuing Legal Education of the American Law Institute, Collaborating with the American Bar Association. 1949. $2.00. Pages 132.*

This is an interesting and important contribution to the program on continuing legal education which has been undertaken by the American Law Institute and the American Bar Association. The old days in which every lawyer was supposed to be competent to draft a will for any client have passed away. Even in the old days, there was likely to be trouble if the client wished to tie up his property for any considerable time through the creation of a trust involving future interests, unless the lawyer had a special competency in such matters. Nowadays we are faced not only with the difficulties that arise from attempts to foresee and provide for the contingencies that may arise when future estates are created, and from the sometimes devastating operation of the Rule against Perpetuities, or rules against restraints upon alienation, but also there is the brooding omnipresence of an elaborate and complicated system of taxation, federal and state. If the client is to be advised on the creation of a trust *inter vivos* or upon the disposition of his property on his death, the lawyer must become thoroughly acquainted with the law of taxation, as well as the law of trusts and the law governing wills and future interests. Even if he has a good knowledge of these branches of the law, he must develop skill in the application of all this law to the situation of the particular client.

If a lawyer has a fair working acquaintance with these rules of law, but has not had a great deal of experience in applying them, he will find this book of great assistance. It not only discusses briefly and clearly the matters that must be taken into account in estate planning, but gives most useful forms of the appropriate provisions, and comments on those forms. It makes it clear that there are no forms that can be automatically applied by the draftsman, and that the draftsman will be called upon to do his own planning. But in such planning he is here supplied with the materials which will be combined to build up the plan.

The book brings out the fact that although the saving of taxes is a part, an exceedingly important part, of estate planning, it is not the whole of it.

AUSTIN W. SCOTT
Harvard Law School

THE DRAFTING OF PARTNERSHIP AGREEMENTS. By *John E. Mulder and Marlin M. Volz. Published by the Committee on Continuing Legal Education of the American Law Institute, Collaborating with the American Bar Association. $2.00. Pages v, 131.*

Once again the American Law Institute has made available to the Bar a compact and carefully-written handbook on a subject of importance to every general practitioner.

Few forms of business organization have as great flexibility or adaptability to different circumstances as the partnership. Few are cheaper to organize, easier to form, easier to change or easier to liquidate. The variety of purposes to which they can be adapted is possibly the very cause of the scarcity of adequate aids to draftsmanship in the average lawyer's library. The authors of this new book, however, realize that a mere collection of forms without analytical comment would be more bulky than useful. Consequently their text, after outlining the legal nature and attributes of general and limited partnerships under the Uniform Acts prevailing in most states, sets out some comparatively short and simple illustrative forms, and then proceeds to discuss the topics most likely to be encountered, such as capital contributions and withdrawals, the sharing of profits and losses, management, settlement with a deceased or retired partner, firm name and good will, and final liquidation. These comments constitute the largest and to my mind the most valuable part of the book, and deserve reading by anyone who believes that the basic ingredients of good draftsmanship (apart, of course, from some familiarity with the law) are foresight, common sense and clarity, and not scissors and the paste-pot.

In spite of the widespread use of the partnership form of organization, lawyers (and courts) still occasionally disagree as to just what sort of a legal creature a partnership is. If a reviewer differs somewhat with an author on this point, I trust that neither can be said to be wholly wrong. The divergences of legal theory are illustrated in the problems concerning the relation between a deceased partner and the continuing partnership and the partners thereof. The authors of this text evidently take the view that when a partner dies there are only two ways of settling his interest in the firm, *viz.*, either by having the surviving part-

ners purchase his interest, or by turning his estate into a partner. This seems somewhat categorical to me, and I question whether the parties and their draftsman are really limited to these two choices. If a partner at the time of his death has $10,000 capital and $2,000 unwithdrawn profits in the business, and if the firm has plenty of cash in its treasury and pays $12,000 to his estate, it seems to me unnecessary and unreal to characterize the transaction as a purchase of anything by anyone. If the firm does not have sufficient cash to make this payment, it must of course either procure it, by selling assets or taking in a new partner or otherwise, or else go out of business. If the continuing partners elect to put up the money out of their own pockets, the result might be argued to be a purchase; but this would be due to circumstances, and decisions made *inter vivos*, and not to the requirements of the agreement. As for making the estate itself into a partner, it has never been clear to me that this could be assured by the partnership agreement, since I do not see how an executor or any other nonparty can be made a partner by operation of law alone or compelled to sign partnership articles against his will. Furthermore, since an estate without an executor seems clearly to lack the status of a jural person, there must always be a time lag between the decedent's death and the achievement of any sort of partner-relationship by his estate, which in the case of a partner having large capital could be serious or fatal to the firm's business.

If this be criticism of a part, the book as a whole deserves more than enough praise to offset it. The authors have been diligent in their research and effective in their presentation. Throughout the text the tax characteristics of a partnership are well brought out, and the tax annotations alone are well worth the modest price of the book. It is an excellent piece of work, and deserves a place in every law office.

DEAN K. WORCESTER

New York, New York

LEGAL PROBLEMS IN TAX RETURNS. *By Thomas P. Glassmoyer and Sherwin T. McDowell. A publication of the Committee on Continuing Legal Education of the American Law Institute, Collaborating with the American Bar Association. 1949. $2.00. Pages 100. (Also available as one of a series of six similar publications priced at $10.00.)*

This concise handbook of useful information covers both the procedure and substantive law involved in preparing and filing federal income tax returns. It is designed for general practitioners in small as well as urban communities and emphasizes the basic fundamentals of the income tax law.

The introduction to the handbook discusses the types of taxpayers and tax returns, the "taxable year" concept, and the steps in computing tax. The second section deals with the income tax pattern, including the withholding of tax from wages, the declarations of estimated tax, and the final tax returns.

In the introduction to the handbook the authors point out that determination of the tax liability of any taxpayer, whether an individual, a fiduciary, or a corporation, involves four steps:

(1) Determination of gross income.

(2) Determination of net income by subtracting allowable deductions.

(3) Determination of the tax base by subtracting available exemptions and credits.

(4) Computation of the tax by application of the appropriate rates to the tax base.

In keeping with the practical approach of the American Law Institute publications, each of these four steps is carefully developed in the last four sections of the handbook by using the return of an individual on Form 1040 as an example.

The section on gross income recognizes at the outset that the definition in Section 22 (a) of the Internal Revenue Code leaves many gross income questions unanswered. Accordingly the authors of the handbook discuss the items which by statute or judicial decision are clearly gross income (such as compensation for personal services, dividends, interest, annuities, rents and royalties, profits from the operation of a business or profession, gains and losses from sales and exchanges of property and income from partnerships, estates and trusts) and then discuss items which are likewise not gross income (such as life insurance proceeds, gifts, bequests and devises, interest on government bonds, compensation for personal injuries or sickness, improvements by a lessee on a lessor's property and recovery of bad debts). The authors do not emphasize the theory of gross income or attempt to develop a concept of a taxable income, but the treatment of the subject in the handbook is satisfactory for purposes of preparing income tax returns.

Deductions are considered in two different places in the handbook. Business deductions are discussed in the section on gross income in connection with profits from the operation of a business or profession. The itemized deductions and the standard deduction which may be taken instead of the itemized deductions are discussed in a separate section following the one on gross income. This division of the subject follows the arrangement on the individual income tax return, Form 1040, and emphasizes the fact that some items (such as interest and taxes) may be deducted by the taxpayer advantageously as business expenses rather than as itemized deductions on page three of Form 1040.

Adequate sections on exemptions and on the computation of tax complete the handbook.

For the attorney whose income tax practice consists principally of preparing returns at the beginning of each year, this handbook on the legal problems in tax returns furnishes an excellent review of the subject. For the attorney who is involved in income tax matters the entire year and does not need to review the subject at the beginning of the income tax return season, the handbook nevertheless provides a useful reference work for the detailed rules used in

preparing income tax returns.

LEWIS D. SPENCER

Chicago, Illinois

BUSINESS LAW. *Edited by John C. Teevan and Len Young Smith. Volume Two. By Len Young Smith, Robert A. Sprecher and John F. Sembower. St. Paul: West Publishing Co. 1949. $5.00. Pages 667.*

Teevan and Smith's projected four-volume series on business law is designed to represent about the maximum content which should, in the authors' experienced opinion, be given to the subject of business law in a college school of business. Volume Two, recently published, is wisely organized so as to include the three closely related subjects of bailments, sales and negotiable instruments. Each of these receives separate treatment, within the Volume, and it is Part Three, "Negotiable Instruments," with which this review is concerned.

Not only does Part Three undoubtedly represent a major advance in the training of business school students in the legal aspects of negotiable instruments over that to be derived from the hitherto customary standard text of business law, but it also constitutes a potential contribution to law school classrooms. The organization and selection of cases proceeds in the conventional manner of law school casebooks on this subject, although some of the reported cases may be edited a little more severely than is usual when the primary purpose is to train law students in reading cases. On the whole it is a thoroughly adequate vehicle for law school use in bills and notes as such a course is ordinarily conceived and executed. To be sure, Part Three, directed toward use by students of business law, does not purport to be an attempt to make the now almost bootless bills and notes course once more a vital part of the law school curriculum. For the law student the book represents the traditional middle course between two emerging trends in the teaching of negotiable instruments law: on the one hand, the presentation of a few cases, either very discriminatingly selected or very skillfully fabricated for their problem-raising potential, designed primarily as a pedagogic device for stimulating close analytical application of the legal concepts learned within the rigid conduits and fixed contexts of first-year courses, and, on the other hand, the presentation of a panoramic collection of cases illustrating the almost innumerable facets of commercial life that may become involved with the law of negotiable instruments and designed, with much emphasis on "practical" training, to remove the law student from the rarefied atmosphere of legal discipline and face him up to the facts of life and the law. To combine these two approaches is next to impossible within the time allotted the course in the law school program, and the authors of the present volume have fortunately not yielded to the scholarly compulsion to include so much material that the product is indigestible within ordinary time limitations. Indicative of this is the absence of footnotes.

Only one omission in the selection of cases seems to require comment. This is the failure to deal, except incidentally, with the problem of check collection, which would seem to be significant enough in its own right to business students to merit some independent treatment and is also an excellent way of presenting to the student the problem of restrictive indorsements. Perhaps this subject is more properly left to other courses in the business school curriculum. Also, it is unfortunate that Article Three of the American Law Institute's proposed Uniform Commercial Code was not in such form at the date of publication of the present work that it could have been included in the material presented. Appreciation of the current problems raised by existing law and an understanding of the changes proposed offers an extremely good technique for increasing the student's comprehension of the subject of negotiable instruments. Perhaps this material can be included later by way of supplement at such time as it has become sufficiently static and crystallized for student presentation. On the other hand, the cases which have been used are well selected for their pedagogical content, interest and recent date. In the chapter on "Holder in Due Course" the authors have happily included cases bearing on the inevitable classroom question of whether notice of a particular defense or equity existing in favor of one party to the instrument is sufficient to prevent the holder from being a holder in due course as regards other unknown defects on the instrument—a significant omission in most bills and notes casebooks.

But what makes this work particularly valuable for teaching purposes are the concise textual summaries which precede the cases in each chapter. Mr. Smith, in his preface, suggests that law students might find these of aid in examination review, and this is certainly true. But it may be suggested that they can be put to even more yeoman service by serving as a general introduction for the new student to this particular field of law. A preliminary reading of this well-drawn over-all picture of negotiable instruments law would place the troublesome little pieces of paper in a less forbidding aspect and help to cut them down to the size of the ordinary student. Much essentially unproductive effort and turmoil on the part of the teacher and student could then be saved, and the serious business of coming to grips with problems which are of real concern to commercial life could proceed apace, unencumbered by the lack of an elementary conception of the background from which such problems emerge. There is precious little such good reading material for students in the field of negotiable instruments and none, outside of the present work, has appeared which is short enough and reliable enough for general class assignment.

In short, Volume Two of Teevan and Smith's *Business Law* cannot help but add greatly to the depth and thoroughness of the business student's training in the subjects

covered and it is at the same time an excellent contribution to the materials available for law school study.

CALVIN P. SAWYIER
University of Chicago Law School

POLICY AND ADMINISTRATION. *By Paul H. Appleby. University, Alabama: University of Alabama Press, 1949. $2.50. Pages 170.*

Because its task has become more complex and because the demands made upon it have increased in almost geometric proportions, Congress has been compelled to delegate many of its traditional functions to the executive agencies. The planning of new legislative programs renders it impossible to maintain a close scrutiny of the activities of the agencies already in existence, leading many people to believe that the executive agencies comprise a fourth branch of the Government responsible neither directly to Congress nor indirectly to the electorate. Because the members of the administrative agencies are not required to stand for election at stated intervals, their critics maintain that agencies are not subject to any effective popular control.

Although Dean Appleby's purpose in *Policy and Administration* is to describe the operation of the executive agencies with relation to their policy making function in administration, the book, as he concedes, appears to defend the agency's position in a democratic government. He is not concerned with the fact that the agencies are staffed with permanent employees who are not subject to periodic public elections, nor is he disturbed by the ineffectiveness of the constitutional checks and balances as an instrument of control over the administrative agencies. He proposes the electoral process as only one of eight political processes by which the Government of the United States is carried on, and in which the citizen may participate, and it is through the other seven processes that the individual citizen influences administrative action. He depicts a system of administrative checks and balances and insists that they are more adequate than those provided by the Constitution.

The critics of the executive agencies will perhaps not agree with the author's conclusions, but they will find the book challenging, for Mr. Appleby has questioned the major premises on which the critics have based their case. The writer points out that as long as delegation is revocable, Congress has not relinquished its power. He suggests that no responsible citizen questions the desirability of Congress having the power "to stop the executive branch including the President from doing any particular thing it strongly desires not to be done."

"Power centralized in Washington," declares Dean Appleby, "is in reality greatly diffused among many agencies and divisions of agencies." The competition between the various agencies serves as an effective check on the concentration of power in any one. Aside from inter-agency competition, personnel in the agencies "desire to be liked by citizens," a desire heightened by the capacity of those citizens to make trouble for them.

While normally most decisions of the executive agencies are not made in a political atmosphere, the author observes that a decision of minor importance by a lesser official may be called up at any time for higher-level consideration by officials sensitive to public opinion.

Our scribe is not a stranger to the government in action. He recognizes the little mentioned practice of the members of Congress to interfere individually in strictly administrative matters, either disturbing the orderly flow of business in the agency or producing a sense of frustration in the Congressman when the agency balks at a strictly personal demand.

"The attempts to make sharp and real the separation of powers has been abandoned," declares Dean Appleby, "except by lawyers, who are the principal protagonists in an effort to secure a separation of powers within the executive agencies."

Falling into the error of oversimplification, the author has not fully stated the lawyer's position in relation to the separation of powers; for lawyers have objected to the concentration of functions not so much because of the violation of a theory of government but rather because the same members within the agencies who act as prosecutor also act as judge. Such a practice ignores one of the basic principles of our system of jurisprudence, namely, that no one should be judge of his own case.

The lawyer's opposition to executive agencies often decreases in the ratio that the administrative bureaus provide for *bona fide* hearing commissioners.

Presented originally in the form of a series of lectures at the University of Alabama, the content is analytical rather than critical. The lectures are extremely valuable reading for all students of public affairs. Although he will not find the answers in the book itself, the reader should find materials which will enable him to make his own evaluation of the proper function of the executive agencies in our system of government.

DONALD KEPNER
Rutgers University School of Law

VICTORS' JUSTICE. *By Montgomery Belgion. Hinsdale, Illinois: Henry Regnery Co. 1949. $2.75. Pages 187.*

Even those who honestly believe in the correctness of the basic principles vindicated by the judgment of the International Military Tribunal at Nuremberg should nevertheless welcome a serious presentation of objections thereto. Such a discussion may promote the clarification of fundamental issues. However, the present booklet by a British journalist is anything else but constructive criticism. It is a cheap vilification of the high achievement that the Nuremberg Trial undoubtedly was, irrespective of any shortcomings which may have affected this novel venture. It is an abusive misrepresentation of the noble purposes of those who engineered the trial. The

publication of this book shows a strong lack of good taste, to say the least, perhaps equal to that of the publication of the French book, *Nuremberg où la Terre Promise* by Maurice Barèche.

In substance according to Belgion, the Nuremberg Trial was no genuine but sham justice. Its purpose, he intimates, was a double one: to satisfy feelings of revengefulness and to fabricate a moral justification for reparation claims. In vitriolic, sometimes even scurrilous language, he denies the good will of those who organized the trial. According to him, "the ostensible legality of the trial was really fraudulent"; "the Nuremberg Trial was akin to lynching"; the sponsoring governments were "no more than a gang of lynchers dealing with victims".

His propositions are even more outrageous when he attempts to establish a parallel between the procedure against former Nazis under the occupation regime in Germany and the racial persecutions under Hitler. Says he: "The treatment called denazification, to which so many Germans were subjected after the unconditional surrender, is the equivalent of persecution of Jews in the twelve years before".

In his frontal attack against the Tribunal's jurisdiction, he claims that the victorious powers had by their own crimes disqualified themselves from sitting in judgment against defeated Germany. "Their hands were not clean", is his much-labored main argument. It is not necessary to go into the sometimes fantastic allegations presented by the author in justification of his bold accusation, mostly based on journalistic reportage or otherwise insufficient documentation. Nor is it necessary to show logical defects inherent in his point. Rather, for the present purpose it is sufficient to point out that even the starting point of his argument is without any foundation. It is utterly untrue that at Nuremberg the victorious powers judged defeated Germany. Rather, at Nuremberg, individuals of immaculate ethical and professional backgrounds were sitting in judgment over individuals charged with specific crimes. Governments were at Nuremberg neither on the Bench, nor in the dock. Each of the American, British and French judges, to say the least, exercised an independent judgment, and was as such responsible only to his own conscience. That they did not reach predetermined conclusions, is illustrated by the three acquittals the justification of which is vividly debated even to this present day. That they had "clean hands" will not be challenged even by Mr. Belgion. This undermines the very essence of his argument.

Not only the jurisdiction of the Tribunal is challenged by him, but also the legal and even moral justification of any conviction arrived at by it. In substance according to him, not a single one of those convicted in the trial had been guilty of any crime under the then existing law; rather, each of them was the victim of a hypocritically-engineered miscarriage of justice.

While it must be admitted that he occasionally makes a good point, the bulk of his discussion would seem to be devoid of any persuasive or otherwise constructive effect, in view of his superficial and strongly biased approach and the insufficient foundation and logical weakness of most of his arguments.

MAXIMILIAN KOESSLER
Forest Hills, New York

THE CANADIAN LAW AND PRACTICE RELATING TO LETTERS PATENT FOR INVENTIONS. *By Harold G. Fox. Third Edition. Toronto: The Carswell Company, Limited. 1948. $35.00. 2 Volumes Pages xcviii, 1631.*

A little over ten years ago, this reviewer reported on the second edition of this work. (24 A.B.A.J. 389, May, 1938) New editions of lawbooks are everyday occurrences; what is noteworthy in this instance is the increase in the content. In spite of a notable omission to which later reference will be made, there has been an increase of more than 125 per cent in the number of pages. This greatly expanded treatment of a legal subject so closely related to industrial activity is clearly a measure of the manufacturing growth in our neighbor to the north.

As in the previous edition, the author has drawn comparisons between the law in his own country and that of Britain and the United States. It is interesting to observe that the Canadian judges have followed, sometimes one, sometimes the other with generally appealing results.

For the most part, the treatment is somewhat fuller but in no sense padded; the appendices and forms are particularly noted in this respect. The war laws still having effect are included. In line with American developments, the topic requiring greatest expansion is the chapter on "Patents and the Government". The subject of trade secrets also comes in for more attention.

It is regrettable that the annotations have been removed from the Patent Rules. It is believed that questions of practice before the Canadian Office are of sufficient interest to the Patent Bar so that a separate treatise on this work may be looked for.

KEITH MISEGADES
Red Bank, N. J.

DICEY'S CONFLICT OF LAWS. *Sixth Edition. G.H.C. Morris with Sons, Ltd.; Sweet & Maxwell, Ltd. Specialist Editors. London: Stevens & 1949. £1 s. 10. Pages cxxix, 912.*

This most recent scholarly modernization of the English lawyer's *vade mecum* for handling problems of conflict of laws is a well-edited book which will probably appeal to teachers of the subject in American law schools. It retains the traditional form; *i.e.*, the categorical statement of a rule, followed by an explanatory comment and, in turn, by one or more illustrations of the application of the rule to a fact situation. While the form is suggestive of the American *Restatements*, the content is not open to the criticism often hurled at

Restatements to the effect that they expostulate what the law ought to be, rather than describe what it is. The editorial practice follows the lines drawn by English judges in deciding an issue of conflict of laws; looking first for an applicable act of Parliament, next for precedent in point, and, failing both of the foregoing, considering the decisions of foreign courts, the opinions of legal writers and arguments drawn from the broad general principles of the field. Although it is denominated "essentially a practitioners' book, not a work on theoretical jurisprudence," it seems most probable that this edition of *Dicey's* will not receive wide acceptance by practicing attorneys in the United States. There are several reasons for this conclusion.

In the first place, the practice of inclusion of extensive references to American cases which was adopted in the fifth edition has been abandoned. The editor is of the opinion that this policy change was required because of the publication of Professor Beale's *Treatise* in 1935, as well as by the difficulties of keeping abreast of American state court decisions under present conditions in England. In place of the presently-deleted citations of cases decided by courts in the United States, the editors have utilized a considerable number of decisions by the courts of the other English-speaking nations, " . . . in the hope that they will be of use to Dominion . . . readers." Of course, there are many references to the *Restatement* (hence to Beale's *Treatise*), but it is the writer's opinion that a mode of approach to American decisions which begins with a perusal of the English rule and thence proceeds to the *Restatement* or Beale's *Treatise* would result only in the addition of an unnecessary step to the system of research.

A second objection to the adoption of this book as a working tool by the American lawyer is the fact that the American lawyer must be cognizant of those areas of the law of conflict of laws in which the applicability of the "due process" or "full faith and credit" or some other clauses of the United States Constitution compels adoption or rejection of a particular conflict of laws rule. This English work quite naturally makes no mention of this constitutional compulsion which prevails in the application of conflicts' rules in our federal system. This is not to say that the principle of a strong motivation for "automatic" recognition of judgments by the courts of an associated nation or dominion is unknown to the English lawyer. However, the provisions of the Administration of Justice Act of 1920 and the Foreign Judgments (Reciprocal Enforcement) Act of 1933 as well as the practice thereunder are materially different from the American legislation whereunder constitutional "full faith and credit" may be accorded to the judgments of the courts of sister states. It would seem to follow that rules formulated under the English scheme would be without parallel in the American system. Turning to the problem of the application, *vel non*, of the law of the foreign state to the facts which transpired in the state, which is within the purview of the "due process" clause of the United States Constitution, however, it would seem that the English view of the fundamental principle of comity is not different from the basis of American "due process." As *Dicey's* so succinctly states, "It is clear that the motive for giving effect to, *e.g.*, French law as regards a contract made in France is not the desire to show courtesy to the French Republic but the impossibility of determining the rights of the parties to the contract justly if that law be ignored." The principal difference between English and American practice in this area is that while "comity" is a matter for the highest court of each Dominion, "due process" by American state courts is subject to review and enforcement by the United States Supreme Court.

A third objection, acknowledged by the present editor himself and one not limited to American readers, concerns the style of presentation. The categorical statement of rules, followed by other rules, which may be qualifications or exceptions to earlier rules, is not only a cumbersome form, but also is one likely to lead to a conclusion of certainty in the law not borne out by the cases actually decided—and this though every effort be exercised to refrain from abstract theorizing in the formulation of the statements.

It would be most unfair, however, to fail to point out that there are some rules and the application of many others, as included in this work, that have no counterpart in American decisions. This may be due, in part, to the fact that the English courts have more frequently been confronted with problems involving possible recourse to the application of the law of foreign nations than occurs in the average American forum. Apart from decisions under specific legislation, many English rules as announced by English cases have been advantageously used in support of rules advocated in American courts. This has most often been the case where there was no local case in point, and where there was a series of English decisions, indicative of the long experience of the English court in developing the rule.

Thus, while it would seem that their numbers will most likely be few, this book may well be of utility to some practicing attorneys in the United States.

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UNIVERSITY OF NOTRE DAME NATURAL LAW INSTITUTE PROCEEDINGS. *Volume 1. Edited by Alfred L. Scanlan. University of Notre Dame. 1949. Pages 142.*

What is this thing called natural law? Whose idea was it or is it? Where does it belong, if it belongs at all, in the science and practice of law? Some leading American natural-

(Continued on page 81)

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EDITORIAL OFFICE

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■ *Between the Extreme Right and the Extreme Left*

In Mr. Abrahams' article on the English Legal Assistance Plan, published in this issue, he reports that Mr. Lund, secretary of the Law Society which will administer the plan, has had to steer a careful course "between the extreme right and the extreme left".

The extreme left avowedly desired to socialize and nationalize the legal profession; it wanted the plan to be controlled and operated by laymen—governmental officials—with the lawyers playing a subordinate rôle.

The leftist group was routed by three forces. First, the Law Society stated flatly that unless the plan was to be left in the hands of the legal profession its members would refuse to participate in it. Second, the spokesman for the Conservative Party stated in Parliament that had the Conservatives been elected in July, 1945, they would have introduced this plan as their own. Third, Sir Hartley Shawcross, who as Attorney-General guided the bill through the House of Commons for the Labour Ministry, is perfectly clear in his own mind. As he said in his address to the Legal Aid Convention in Boston on October 14:

> I am a Socialist. I believe in socialism—in the right places. The legal profession is not the right place; it is the wrong place. The English Legal Assistance Act neither socializes nor nationalizes the legal profession.

The extreme right consisted of those who denied that there was any problem, or claimed that it was greatly exaggerated, or insisted that nothing could be done about it anyhow. This rightist group did not organize or fight publicly. Its power lay in the fact that it consisted of eminently respectable, entirely honest gentlemen. The method was to block or delay any action by the legal profession.

This type of obstruction was greatly feared by the responsible officers of the Law Society because, had it succeeded, it would have proved that the legal profession was unable or unwilling to administer the plan. In that event, the extreme left would have triumphed and, in all probability, the representatives of the English people would have refused to entrust the carrying out of the plan to the organized Bar.

■ *Country Lawyers in the Association*

In the October JOURNAL appears a letter from an astute lawyer in Newton, Iowa. He asks the question, "Has the small-town lawyer ignored the American Bar Association or has the Association ignored him?" He follows by citing figures which demonstrate that no matter who is doing the ignoring the fact is that the small-town lawyers are not exercising leadership in the Association in adequate numbers. All who are engaged in carrying on the work of the Association agree in their desire to have associated with them more men from the grass roots. The problem of the administration is how to interest the small-town lawyer and obtain his wider participation in Association affairs. The letter published in the JOURNAL opened eyes to the possibility that the country lawyer might feel that he was being ignored by the Association in spite of the desire of all of those who had a voice in the affairs of the Association to enlist the aid and participation of more small-town lawyers. There have been exasperating indications that many members thought of their membership in the Association as nothing but a condition precedent to receipt of the JOURNAL and the year book.

Our critic does not attempt to place the blame but concludes by saying that "it behooves the Association to keep this discrepancy in mind in its work throughout the year".

We can assure our correspondent and our readers of the determination on the part of the administration of the Association now as never before to have the Association avail itself of the aid of the country lawyer in ever increasing measure.

By and large the work of the Association is done by committees, either of the Association or of the Sections. Those appointed to these committees are usually men known to the appointing official for their industry and ability. The attendance at Annual Meetings of members from country districts would make them better known. The country lawyers do not attend the meetings in large numbers. This may be the inevitable result of the comparatively modest financial rewards of practice in the country. It seems to us, however, that this need not be the determinative factor. Leaders of the Association are at present advocating, as they have in the past, integration of the work of the corresponding

committees of the American, state and community bar associations. (See The President's Page in this issue.) If that can be accomplished, the American Bar Association member who participates in bar association activities at home but is unable to attend American Bar Association meetings will nevertheless become known to all who work in the same field and his availability for service in the American Bar Association will no longer be hidden.

By that or some other device it is imperative that the strength of the backbone of the profession be brought into play more extensively in these critical times.

It is only fair to point out, however, that a high percentage of the members from country districts and small communities already occupy positions of importance and leadership in the House of Delegates, on the Board of Governors and as members of important committees of the Association and its Sections—in fact probably a higher percentage of their total numbers than the percentage of the total numbers of the members from the large centers.

■ *The Justices and the Numbers Game*

One of the fascinating new games being played by some law professors and others is to compute the "box scores" of the votes of justices of the Supreme Court in various important lines of cases. Latest among these is Irving Dilliard who, with the aid of Professor John P. Frank of Yale Law School, has published some statistical confusions on civil rights cases in the December, 1949 issue of the *Atlantic Monthly*. Mr. Dilliard has been preceded in this field by Professor C. Herman Pritchett of the University of Chicago *(The Roosevelt Court,* 1948).

The new game is played by Mr. Dilliard this way. He has taken the civil rights decisions of the Supreme Court for the last three terms and tabulated the individual votes of the justices based on whether they voted for the claimed civil right or against the claimed civil right. Here is a compilation for the three terms between 1946 and 1949:

Justice	*For Claimed Right*	*Against Claimed Right*
Murphy	53	3
Rutledge	52	4
Douglas	47	10
Black	39	17
Frankfurter	23	34
Jackson	14	41
Burton	10	47
Reed	8	49
Vinson	8	49

He concludes that "Frank Murphy was the most devoted defender of human rights on the supreme bench"—to which punster Mark Howe, Justice Holmes' biographer, has wittily replied, "The quality of Murphy is surely strained if it is made the sole standard of constitutional

criticism". Mr. Dilliard also warns the Justices that they had better get used to such statistical vivisection—a warning that probably is regarded with amusement in view of the past criticisms made of the nine old, the nine young, the nine honest men of our High Court. In addition Mr. Dilliard expresses some anxiety because of the five-to-four votes which occasionally decide a case against a citizen's claimed civil right.

This little numbers game is one which, like other numbers games, may result in some very unhappy conclusions. The professional gamesters who play it can give it enough color of statistical truth by a delusive oversimplification of it to achieve a misleading plausibility. Such statistics are derived from dubious standards and are therefore of doubtful value as a method of analysis for judicial opinions.

Two illustrations will suffice.

Mr. Justice Holmes, in the *Schenck* case, said, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic". Mr. Justice Brandeis said in *Dorchy* v. *Kansas* that, "Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike". Suppose, however, that claims are made by a defendant to justify conduct on his part that his right to shout fire in a theater is protected by the civil right of free speech or that he has the absolute right to strike even against his Government. If these civil rights issues were presented to the Court the Justices would be required to vote for or against the claimed right. By voting against each of these claimed rights, both Messrs. Holmes and Brandeis would be classified by the gamesters as conservatives!

The fallacy in this numbers game inheres in its single valued criterion of judgment. The Supreme Court Justices and their opinions can only be intelligently appraised from a multivalent viewpoint, not by one single scale, but by several. The single-minded approach, the "for" or "against" standard is characteristic of a superficial analysis, perhaps lately used to produce "astonishing box scores"—yet delusive and inaccurate ones.

As to five-to-four decisions and the denial of a civil right to a citizen by the vote of a single Justice, surely it must be apparent that a single vote can decide a case one way or the other whether the standard is five to four, six to three, or seven to two. How many plaintiffs have lost their cases by a jury vote of eleven to one, by the vote of a single man? On the other hand, how many criminal defendants in history have owed their lives to the obstinacy of a single juror who held out to the end for acquittal? It must not be overlooked that a single vote can sustain as well as defeat a claimed right.

The numbers game has always been hard to beat. We doubt whether Messrs. Dilliard, Frank and Pritchett have found the magic formula yet.

Survey of the Legal Profession in Canada Holds First Council Meeting

THE FIRST MEETING of the Council for the Survey of the Legal Profession in Canada was held at North Hatley, Quebec, on November 11 and 12. The Honorable C. P. McTague, K.C., Director of the Survey, and the following members of the Council were present: A. N. Carter, K.C., President, Canadian Bar Association, Saint John, N.B.; Professor J. A. Corry, Chairman, Canadian Social Science Research Council, Kingston, Ontario; John T. Hackett, K.C., Montreal, Quebec; Emmett M. Hall, K.C., Saskatoon, Saskatchewan; John G. Higgins, M.A., K.C., St. Johns, Newfoundland; F. Cyril James, M.A., B.Com., Ph.D., Principal and Vice-Chancellor, McGill University, Montreal, Quebec; D. Park Jamieson, K.C., Sarnia, Ontario; J. Edouard LaBelle, K.C., President, Canadian Vickers Limited, Montreal, Quebec; Robert Lévêque, Montreal, Quebec; Stanley H. McCuaig, K.C., Past President, Canadian Bar Association, Edmonton, Alberta; W. C. J. Meredith, K.C., Montreal, Quebec; Gustave Monette, K.C., Montreal, Quebec; John Paton Nicholson, Charlottetown, P.E.I.; John W. Pickup, K.C., Toronto, Ontario; André Taschereau, K.C., Quebec, P.Q.; J. S. D. Tory, K.C., Toronto, Ontario.

In the absence of Mr. Patrick Conroy, Secretary-Treasurer of the Canadian Congress of Labour, Dr. Eugene Forsey, Director of Research for the Canadian Congress of Labour, sat in on the discussions. Dr. N. A. M. MacKenzie, C.M.G., K.C.; Mr. Vincent C. MacDonald, K.C., LL.D.; Hon. James C. McRuer, LL.D.; and Mr. Clarence D. Shepard were also unable to attend.

After the adoption of a Constitution, the following officers were elected: Chairman, John T. Hackett, K.C.; Vice-Chairman, André Taschereau, K.C.; Treasurer, J. S. D. Tory, K.C.; Secretary, John P. Nelligan. The appointment of Mr. McTague as Director was confirmed, and a vote of confidence extended to him.

An executive committee was established, composed of the officers and Messrs. Corry and Pickup. J. S. D. Tory, André Taschereau, and Dr. Cyril James were named to the Budget Committee, and Chief Justice McRuer, Gustave Monette and A. N. Carter make up the Committee on Publications.

THE PRESIDENT'S PAGE

HAROLD J. GALLAGHER

■ At the time this issue of the JOURNAL reaches your desk, four busy months will have passed since I assumed the arduous but interesting duties of President of the American Bar Association. This is my first report to the membership as to my activities and program for the ensuing year.

Appointment of Committees President's First Task

By amendment of the By-Laws of the Association at the St. Louis meeting, many special committees were constituted standing committees. The membership of most standing committees was increased to seven members and the terms of each member fixed for three years, with the proviso that initial appointments should be two for one year, two for two years and three for three years. The responsibility for naming committees for such a period imposed an additional burden upon an incoming President. This task, too, was made all the more difficult because, due to my election, on September 7, following the unfortunate death on August 14, 1949, of Philip J. Wickser, at Buffalo, who had been nominated as President for the current year, I did not have the customary four or five months in which to make selections for the various standing and special committees.

It must be recognized that at most but a small proportion of the entire membership can be appointed to American Bar Association committees on the national level. It is a matter of sincere regret to me that I could not give deserved recognition to many more persons. In making the appointments, the policy adopted was to widen the base as much as possible, to appoint a person to not more than one committee and to try to bring into the official family some outstanding lawyers who had not previously taken an active interest in the Association's affairs. My hearty thanks are due the State Delegates and others who by their recommendations and advice greatly aided me in making the appointments to the various committees. It is my earnest hope that these committees will function completely and effectively; that each and every member will fully live up to what is expected of him and justify by the results of his efforts the confidence reposed in him implicit in his appointment. I thank each one for his willingness to serve and pledge my whole-hearted support during the year.

Speaking Engagements Kept in Twelve Cities

Since assuming office it has been my privilege to accept invitations to address the following associations:

South Dakota Bar Association, Aberdeen, South Dakota, on September 16, 1949;

Michigan State Bar Meeting, at Detroit, Michigan, on September 30, 1949;

Vermont State Bar Association, Montpelier, Vermont, on October 5, 1949;

Rhode Island State Bar Association, Providence, Rhode Island, on October 10, 1949;

National Association of Attorneys General, 43d Annual Meeting, St. Paul, Minnesota, on October 17, 1949;

Nebraska State Bar Association, Omaha, Nebraska, on October 19, 1949;

Federation of Bar Associations of Western New York, Rochester, New York, on October 21, 1949;

Harvard Law School Forum, Cambridge, Massachusetts, on November 11, 1949;

Brooklyn Bar Association Annual Meeting, Brooklyn, New York, on December 1, 1949;

Jackson and Hinds County Bar Association Meeting, Jackson, Mississippi, on December 9, 1949;

Memphis Bar Association, Memphis, Tennessee, on December 8, 1949;

Delaware State Bar Meeting, Wilmington, Delaware, on December 16, 1949.

I also by invitation attended a meeting of the Executive Committee of the Connecticut State Bar on December 19, 1949.

Manual Is Published on Lawyer Reference Plan

At the request of Reginald Heber Smith, Director of the Survey of the Legal Profession, I delivered, on November 21, a nation-wide broadcast of fifteen minutes over the Columbia Broadcasting System, explaining the Lawyer Reference Plan to supply legal services to persons of moderate means, and referring to the release, on November 22, 1949, of the invaluable manual on this subject prepared by the Survey.

An outstanding seven-member Special Committee on the Lawyer Reference Plan has been appointed, with representatives in the large metropolitan centers, New York, Philadelphia, Cleveland, Detroit, Chicago, Minneapolis and Los Angeles. William M. Wherry of the New York Bar, pioneer in this movement, is Chairman. I fervently hope that all local bar associations in communities of over 30,000 population will support this movement wholeheartedly. Through this means, lawyers will obtain clients they would not otherwise have had and persons of moderate means will be able to obtain competent legal advice for moderate fees. Copies of the manual issued by the Survey of the Legal Profession may be obtained by writing directly to Reginald Heber Smith, Director, Survey of the Legal Profession, 60 State Street, Boston 9, Massachusetts.

In my opinion, this will constitute, from a public relations standpoint, one of the most worthwhile services in which the Bar could engage.

The work of this committee should not be confused with the Committee on Legal Aid Work of this Association, of which Orison S. Marden, President of the National Legal Aid Society, is Chairman. That committee serves persons who are unable to pay even a small fee to private attorneys. In my opinion, in these days when there is such a marked trend of government service to the people in many different fields, it seems more important than ever before that a private organization should undertake to see that people without means should have adequate legal representation. It is hoped that all local bar associations throughout the country will set up strong committees on legal aid work to coöperate with this Association's committee on that subject.

Association Is Stressing American Citizenship

In his valedictory message on the President's Page in the September issue of the JOURNAL, President Holman stated:

> As a parting word to our members I should like to urge that the American Bar Association, as an organization, take a more definite interest in current trends in government and, through its Committees and Sections, give earnest attention to the preservation of our Federal Republic and to the institutions and liberties which have made our nation great and our people free.

With this worthy suggestion in mind, I have appointed a Committee on American Citizenship, with John C. Cooper of the Institute for Advanced Study, Princeton, New Jersey, as Chairman. Mr. Cooper is an outstanding student of government and a scholar, and was for many years one of the leaders of the Florida Bar. He is able and willing to give an adequate amount of his time to the work. The other members of the committee are Robert V. Bolger, Philadelphia, Pennsylvania; Charles E. Dunbar, Jr., New Orleans, Louisiana; Herbert F. Goodrich, Philadelphia, Pennsylvania; George P. Hoke, Minneapolis, Minnesota; Sidney G. Kufworm, Dayton, Ohio; and William C. Mathes, Los Angeles, California. It is expected that the committee, with the active support of the members of the Junior Bar Conference, will prepare brochures or texts to educate students in the grades and high schools, and also as President Holman said, ". . . to educate, or rather, re-educate, the profession and the people of America to a proper appreciation of constitutional government."

Advisory committees will be appointed in each state and when this material has been completed it will be placed in the hands of the members of the Junior Bar and other lawyers volunteering to lecture in the various schools, clubs, civic bodies and other public forums on the subject of the American form of government with a view of teaching a proper understanding of its principles and the blessings which we enjoy under our constitutional form of government.

Through the coördination of activities and integration of effort of the American Bar Association with local and state bar associations, which is one of my primary objectives for the coming year, it is hoped that this appeal to the duties as well as the privileges of American citizenship will be brought home to the people in every community throughout the land.

Hope for Integration of Effort Among Bar Associations

There is great need for a strengthening of the organization of the entire profession. The proper disposition of the nation-wide problems concerning the Bar and the country requires it. It was in order to effectuate that idea that in 1936 the American Bar Association adopted a new constitution creating the present respresentative House of Delegates. By reason thereof, all aspects of opinion are available in meetings of the House and full consideration of problems presented can be had. As a consequence it is well recognized that when the American Bar Association speaks it most truly represents the thinking of the whole legal profession. The first step in organization of the Bar of this country on a national basis was taken when the American Bar Association was established in 1878. The second really great step was the creation of the present House of Delegates by the Constitution of 1936. It is now time for us to take the third and equally essential step, that is, to strengthen the ties between the American Bar Association and the state and local associations. Only by bringing about a closer working relationship between these organizations and thereby achieving a direct integration of effort of the entire organized Bar will it be possible to enhance its influence and effectiveness. During the coming year it is my ambition to emphasize, develop and bring into closer contact, these three relationships: those between the American Bar Association and the state and local associations; those between the American Bar Association and its individual members; and those which will perfect the organization and integration of the Sections and the Standing Committees of the American Bar Association itself. The latter objective is being undertaken most successfully by the very outstanding Committee on Scope and Correlation of Work of the Association.

I hope to stimulate in every state and local organization a personal feeling of the tremendous value and imperative need of organization, as well as a recognition of the value of participation in meetings of the Bar on local, state and national levels, and of the vital necessity for united consideration and serious study of the multitude of present problems facing the profession as craftsmen and, more important, as leaders of public opinion.

In order to coördinate the bar activities and the integration of effort of the American Bar Association with state and local bar associations, the Board of Governors at its meeting on November 4 and 5 authorized, on my recommendation, the appointment of a special committee to accomplish that objective. That committee consists of Robert

R. Milam, of Jacksonville, Florida, as Chairman, and the following additional members: Guy Richards Crump, Los Angeles, California; Edward H. Jones, Des Moines, Iowa; David F. Maxwell, Philadelphia, Pennsylvania; Orie L. Phillips, Denver, Colorado; Charles S. Rhyne, Washington, D. C., and George H. Turner, Lincoln, Nebraska. It is hoped that, through the work of this Committee, committees will be established in state and local associations wherever practicable to take action in respect of the same general matters as are covered by the various Sections and Standing and Special Committees of the American Bar Association to the extent that such matters are of interest to the lawyers in the state. It is hoped that it will be possible to work out arrangements whereby under coöperative action these committees will be representative of the American Bar Association, as well as the state and local associations, so that a given matter in which the organized Bar is interested will be dealt with from the national Association down to the local organization, right up through the national organization by the corresponding committee in each group. The great reservoir of ability among the lawyers of the small towns of the nation should be tapped and it is my conviction that they will gladly respond to this call for public service. In a national way, the American Bar Association is equipped to present to Congress information about legislation of national interest, reflecting the activities of our Association but we are entirely dependent on the state and local associations for performing a similar function in their own communities. Almost as important is their function in leading and influencing sentiment in support of national legislation within the objects and purposes of our Association. By this means, we are doing our best to meet the very stimulating suggestion contained in the October issue of the AMERICAN BAR ASSOCIATION JOURNAL in the communication from Tim J. Campbell, Jr., of Newton, Iowa, in the "Views of our Readers" section entitled, "Where is the Country Lawyer in the Association?" We want him to be an integral part of the Association. All lawyers who are interested in participating as members of associate and advisory committees to be set up in the several states with the coöperation of the state, and local bar associations are requested to write to me at 1140 North Dearborn Street, Chicago 10, Illinois. Each person should indicate the particular phases of bar work in which he would be of the greatest service, the nature of his experience, age, whether or not a member of the American Bar Association, and any other pertinent information that would be helpful to aid in placing him in the most useful position.

There is no intention or desire to interfere in any way with the autonomy and independence of the state and local bar associations; nor is it intended that the American Bar Association interfere with them in any way. The sole object of this effort is to coördinate the activities and to integrate the effort so that the force of the national Bar may be felt at the local level and the force of the local Bar at the national level.

The coöperation of all state bar associations and all local bar associations throughout the country is earnestly solicited and suggestions from individual lawyers as to how best to carry out the plan will be welcomed. The Board of Governors has placed upon the State Delegate in each state the burden of organizing this work and I have written letters to all of them outlining this plan of integration. I have also written to all of the state bar presidents calling attention to the plan and urging their attendance and the attendance of the immediate past president and the incoming president, if known, at a conference of bar association presidents in Chicago on February 25, 1950, at the time of the Mid-Year Meeting of the House of Delegates to perfect finally the plan of coördination and integration of effort. All presidents of local bar associations are also cordially invited to attend the meeting, together with the secretaries of all state and local bar associations. The members of the Special Committee on Coördination and I, myself, earnestly urge the support of all lawyers for this plan to muster our collective power for the common weal.

The English Legal Assistance Plan

(Continued from page 33)

Abrahams Report about enactment of Legal Aid Scheme and about work of Law Society setting up machinery for whole plan. Reports reaching here say the Plan has been virtually abandoned for reasons of economy. Is that correct? Has Law Society stopped obtaining offices, recruiting personnel, and forming the area and local committees? Have Legal Advice Centres been indefinitely postponed? We need a statement from you for immediate publication.

Mr. Lund replied at once as follows:

Government decision to defer provisions of Legal Aid Act except for legal aid in high court and court of appeal means complete recasting of administrative arrangements. Recruitment temporarily suspended. Probably shall proceed area and local committees and reduced staff but not legal advice centres. Modified plan under preparation.

On the same day Mr. Smith received the following letter from Sir Hartley Shawcross:

Dear Mr. Heber Smith,

Thank you very much for your letter of November 1st which has been sent on to me, since I have now returned to England.

It was a great pleasure to be invited to the Legal Aid Convention in Boston and to have the opportunity of meeting you and other friends again.

I am sorry to say that owing to the financial difficulties in which the country is placed we have had to postpone the operation of the greater part of the Legal Aid Scheme and this will not now commence next year. We hope very much, however, that the delay will be only a short one, for the importance of the Scheme is recognised on all sides and is not a matter of any kind of political controversy.

Review of Recent Supreme Court Decisions

ABATEMENT AND REVIVAL

Certiorari To Review Conviction of Contempt of Congress Removed from Docket After Flight of Petitioner from Jurisdiction

■ *Eisler* v. *United States*, 338 U. S. 189, 93 L. ed. Adv. Ops. 1326, 69 S. Ct. 1453, 17 U. S. Law Week 4693. (No. 255, decided June 27, 1949.)

Eisler was convicted of contempt of Congress. The Court of Appeals for the District of Columbia affirmed, and the Supreme Court granted certiorari. After argument had been heard, but before the Court announced its decision, Eisler fled the jurisdiction of the United States.

In a *per curiam* opinion, the Court says that its practice in such cases has been to postpone review indefinitely by ordering the case removed from the docket pending return of the fugitive. Accordingly, that procedure is adopted here.

Mr. Justice BURTON did not participate in the consideration of the merits of the case, but did take part in the procedural action that postponed review.

Mr. Justice FRANKFURTER, joined by the CHIEF JUSTICE, wrote a dissenting opinion. He notes that Eisler formally repudiated United States jurisdiction after his flight and that the abstract questions presented by the case are no longer attached to any litigant. He declares that, when a litigant withdraws himself from the power of the Court to enforce its judgment, he also withdraws the questions which he had submitted to the Court's adjudication. The Court has no jurisdiction, he concludes, and the Government's motion for dismissal should be granted.

Mr. Justice MURPHY wrote a dissenting opinion favoring decision on the merits. The Court is not at liberty to assume that all escaped defendants will never return to the jurisdiction, he says, and the importance of a criminal judgment is not limited to imprisonment of the defendant. Eisler subjected himself to the jurisdiction of the Court by petitioning for review, he declares, and he cannot revoke or nullify it and thus prevent an adjudication of the questions raised merely by leaving the country.

Mr. Justice JACKSON wrote a dissenting opinion in which he notes that the case was fully submitted and that all that remains is for the Court to enter their opinions. Eisler's presence for that would be neither necessary nor usual, he observes. He calls attention to the importance of settling the issues raised by the case. "It is due to Congress and to future witnesses that we hand down a final decision," he declares. He would affirm the decision below. Y.

The case was argued by David Rein and Abraham J. Isserman for Eisler, and by Philip B. Perlman for the United States.

COMMERCE

Tax Measured by Gross Receipts from Operation of Pipe Line Wholly Within State Imposed by Mississippi Does Not Violate Interstate Commerce Clause Though Pipe Line Acts as Shipper's Agent in Forwarding Oil by Rail to Out-of-State Points

■ *Interstate Oil Pipe Line Company* v. *Stone*, 337 U. S. 662, 69 S. Ct. 1264, 93 L. ed. Adv. Ops. 1163, 17 U. S. Law Week 4524. (No. 287, decided June 20, 1949.)

The Interstate Oil Pipe Line Company, a Delaware corporation qualified to do business in Mississippi, owns and operates pipe lines used to transport oil from fields in Mississippi to loading racks elsewhere in the state. At the loading racks, the oil is pumped into tank cars for shipment out of the state. When delivered to the pipe line company, the oil is accompanied by shipping orders directing that the oil be transported to out-of-state destinations. The company ships the oil by rail as agent of the owner. The state Supreme Court sustained a tax, measured by the company's gross receipts, levied against the company on the theory that operation of the pipe lines was intrastate commerce and that the tax was "merely on the privilege of operating a pipe line wholly within this State". The company contended that its operations were interstate in character, and that the tax therefore violated the Federal Constitution.

Mr. Justice RUTLEDGE announced the judgment of the Court which affirmed the state court's decision, and delivered an opinion in which Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice MURPHY joined. He declares that Mississippi has the power to impose the tax even if the operation of the pipe line is interstate in character. The case is controlled by *Maine* v. *Grand Trunk Railroad*, 142 U. S. 217, he says, which sustained the imposition of an excise tax, measured by apportioned gross receipts, upon an interstate railroad corporation "for the privilege of exercising its franchise in this State". He notes that there are no due process objections since operation of the pipe lines is wholly carried on in Mississippi, there is no discrimination against interstate commerce in favor of intrastate commerce, the nature of the subject of the tax is such that no apportionment is necessary, and there is no attempt to tax beyond the state's borders.

Mr. Justice BURTON wrote an opinion in which he said that he concurred in the judgment of the Court, but not in the opinion of Mr. Justice RUTLEDGE. He thinks that operation of the pipe lines was intra-

Reviews in this issue by Rowland L. Young.

state commerce, and that the tax is valid on that theory.

Mr. Justice REED, joined by the CHIEF JUSTICE, Mr. Justice FRANKFURTER and Mr. Justice JACKSON, wrote a dissenting opinion. He says that operation of the pipe lines is not intrastate commerce since delivery of the oil to the company for shipment out of the state placed the oil in the stream of interstate commerce. He declares that the state is prohibited by the Constitution from levying a tax upon the privilege of carrying on a wholly interstate transportation business though measured by a fairly apportioned part of gross receipts. Y.

The case was argued by Phelan H. Hunter for the Interstate Oil Pipe Line Company, and by J. H. Sumrall, for Stone, Chairman of the State Tax Commission.

COMMERCE

Order of Interstate Commerce Commission Denying Reparations Claimed by United States as Shipper against Carriers Is Reviewable by District Court

■ *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 69 S. Ct. 1410, 93 L. ed. Adv. Ops. 1175, 17 U. S. Law Week 4583. (No. 330, decided June 20, 1949.)

The United States filed with the Interstate Commerce Commission a complaint against several railroads with whom it had dealt as a shipper during the war. The complaint alleged that the railroads had exacted payment for unperformed services that their rates were unjust, unreasonable, discriminatory, excessive and in violation of certain sections of the Interstate Commerce Act and asked reparations. The Commission found that the charges were not improper or in violation of the Act, denied reparations, and dismissed the complaint. Upon suit in a three-judge district court to set aside the order, the United States was made a defendant as required by the Interstate Commerce Act. The District Court dismissed on the grounds that the Government could not maintain suit against itself and that the three-judge court had no jurisdiction.

On direct appeal to the Supreme Court, the judgment was reversed in a majority opinion written by Mr. Justice BLACK. Noting that the rule that persons cannot create justiciable controversies against themselves is generally sound, he says that it has no application here since the Court, looking behind the names of the parties, finds that a justiciable controversy is presented. He rejects the argument that the statute, in making the United States a party defendant, shows a congressional purpose to bar the Government from challenging the Commission's orders, saying that the appearance of the Attorney General on both sides creates an anomaly only on the surface since the Interstate Commerce Act contains adequate provisions for protection of the Commission's orders by the Commission and the railroads, who are the real parties in interest.

As for the argument that, since Section 9 of the Interstate Commerce Act requires a shipper to make an election between a claim before the Commission and a suit in the District Court, the Government, by seeking the former, barred itself from pressing the latter, he declares that this does not prevent judicial review under 28 U.S.C. § 41 (28) of an unlawful Commission order. As for the jurisdiction of the three-judge court, he says that the Urgent Deficiencies Act, 49 U.S.C. § 9, which requires enforcement of Commission reparation awards in one-judge district courts, indicates the belief of Congress that such orders are not sufficiently important to justify the accelerated judicial review procedure, and that the one-judge trial and appeal procedure would seem equally appropriate for adjudication of the validity of a Commission order denying reparations. However, he concludes, the fact that three judges heard the cause is no reason for its dismissal, and accordingly the decision is reversed and the cause remanded for consideration on its merits by the District Court.

Mr. Justice FRANKFURTER, joined by Mr. Justice JACKSON and Mr. Justice BURTON, dissented in a long opinion. He declares that the Government has opposed, and been sustained by the Court in, four previous suits where shippers sought judicial review of orders of the Interstate Commerce Commission denying reparations against carriers, and that to reverse this settled course of decision now is to "mutilate the whole scheme of the Interstate Commerce Act". He says that the Act defines the course of procedure to be followed, and that 28 U.S.C. § 41 (28) is procedural only, and does not make actions reviewable that are not reviewable under the Interstate Commerce Act. Congress has given the shipper, in the Act, a choice between judicial and administrative relief, he observes, and having chosen the latter, the choice bars him from judicial review. Moreover, he notes, "it has never been suggested, during some sixty years of active litigation over this problem, that for review of such an order resort may be had to a court of equity outside the framework of the Interstate Commerce Act. Even the Government does not now suggest it. . . ." There is no ground for equitable relief here, he states. No jurisdiction can be derived from Section 41 (28) of Chapter 28 unless the order is reviewable by a three-judge court, he declares, and to hold that it is not so reviewable is to hold that no jurisdiction of the District Court is derivable from that section. It is not valid to argue, he says, that the Government had no opportunity to go into court until the Commission had dismissed its complaint, because the Government could have initiated proceedings before the Commission asking merely for a declaration regarding the legality of a past practice but not for damages, and, by so doing, it would not have foreclosed itself from judicial remedy. There is no reason of policy for overturning the previously-settled construction of the reparation clause of the Interstate Commerce Act, he observes, and he would affirm the judgment. Y.

The case was argued by Stanley M. Silverberg and David Mathews

for the United States, by Daniel W. Knowlton for the Commission, and by Windsor F. Cousins for the intervening railroads.

CONSTITUTIONAL LAW

Due Process of Law—Assistance of Counsel for Defendant or Adequate Judicial Guidance or Protection Necessary in Criminal Trial in State Court

■ *Gibbs* v. *Burke,* 337 U. S. 773, 93 L. ed. Adv. Ops. 1343, 69 S. Ct. 1247, 17 U. S. Law Week 4655. (No. 418, decided June 27, 1949.)

Gibbs was convicted of larceny in a Pennsylvania court. The Pennsylvania Supreme Court denied his petition for a writ of *habeas corpus* in which he alleged that he was denied counsel at the trial, thus being deprived of his rights under the Federal Constitution.

The Supreme Court reversed in an opinion delivered by Mr. Justice REED. Reciting the facts of several events at the trial pertinent to Gibbs' claim that failure to appoint counsel violated the Fourteenth Amendment, he remarks that it is clear that "a failure to request counsel does not constitute a waiver when the defendant does not know of his right to counsel". He states that the Court considers the case on the theory upheld in *Betts* v. *Brady,* 316 U. S. 455 (1942), that the Constitution does not guarantee to every person charged with a serious crime in the state court right to the assistance of counsel regardless of circumstances. He notes that nevertheless counsel may be necessary in some noncapital cases in order to secure fairness. He holds that the case is of the type referred to in *Betts* v. *Brady,* at 473, as lacking fundamental fairness because neither counsel nor adequate judicial guidance or protection was furnished at the trial.

Mr. Justice BLACK and Mr. Justice DOUGLAS concurred in the judgment of the Court. They note that they would overrule *Betts* v. *Bradly,* but agree that if that case is to be followed Gibbs is entitled to relief under its doctrine.

Mr. Justice MURPHY and Mr. Justice RUTLEDGE concurred in the result. Y.

The case was argued by Frederick Bernays Wiener for Gibbs, and by Karl W. Johnson for Burke.

CONSTITUTIONAL LAW

Personal, Civil and Political Rights—Facts Examined and Conviction Reversed on Ground Evidence on Which It Rests Obtained by Illegal Search

■ *Lustig* v. *United States,* 338 U. S. 74, 93 L. ed. Adv. Ops. 1369, 69 S. Ct. 1372, 17 U. S. Law Week 4653. (No. 1389, decided June 27, 1949.)

Lustig was convicted of violation of the counterfeiting statute. The sole question on certiorari before the Supreme Court was the correctness of a denial of a pretrial motion to suppress evidence seized allegedly in violation of the Fourth Amendment. A Secret Service agent reported to local police that he suspected that Lustig and a companion were engaged in counterfeiting in a hotel room. The local police obtained a warrant for the arrest of the occupants of the room in order to "get into that room and find out what was in there." They entered in the absence of Lustig and his companion and searched the room. They found articles used in counterfeiting and summoned the Secret Service agent who examined the articles and removed part of them. The District Court admitted these as evidence on the ground that there was no "connivance or arrangement on the part of the Federal officers to have an illegal search made to get evidence they could not secure under the Federal law". The Court of Appeals for the Third Circuit affirmed.

Mr. Justice FRANKFURTER announced the judgment of the Supreme Court and an opinion in which Mr. Justice DOUGLAS, Mr. Justice MURPHY and Mr. Justice RUTLEDGE joined. Declaring that the facts showed that the Secret Service agent was called in before the search of the room was completed and that, while the federal agent did not himself make the search, he did share in the examination of articles found, he concludes, "It surely can make no difference whether a state officer turns up the evidence and hands it over to a federal agent for his critical inspection with the view to its use in a federal prosecution or if the federal agent himself takes the articles out of a bag." In the case of such a search, he said, "It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it." It is therefore not necessary to consider the result of a search made entirely by state officers, he concludes.

Mr. Justice BLACK concurred in the judgment for the reasons set forth in his dissenting opinion in *Feldman* v. *United States,* 332 U. S. 487 (1944).

Mr. Justice MURPHY wrote a concurring opinion in which Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE joined. He declares: "In my opinion the important consideration is the presence of an illegal search. Whether state or federal officials did the searching is of no consequence to the defendant, and it should make no difference to us."

Mr. Justice REED, with whom the CHIEF JUSTICE, Mr. Justice JACKSON and Mr. Justice BURTON agreed, wrote a dissenting opinion. He notes that the trial court found that the Secret Service agent did not participate in the search and seizure. When the federal agent came into the room, he concludes, "The search and seizure had run its course and we should not hold that the appearance of a federal officer at the place of unlawful search and seizure after evidence has been found makes him a participant in the act. This evidence should not be suppressed and the conviction of Lustig should be affirmed."

Y.

The case was argued by Edward Halle for Lustig, and by Philip B. Perlman for the United States.

CONSTITUTIONAL LAW

Due Process of Law—Convictions Reversed in Three Cases of Prolonged Questioning of Prisoners Before Arraignment by Police Officers

■ *Watts* v. *State of Indiana,* 338 U. S. 49, 93 L. ed. Adv. Ops. 1434, 69 S. Ct.

1347, 17 U. S. Law Week 4646. (No. 610, decided June 27, 1949.)

■ *Turner* v. *Commonwealth of Pennsylvania*, 338 U. S. 62, 93 L. ed. Adv. Ops. 1443, 69 S. Ct. 1352, 17 U. S. Law Week 4648. (No. 107, decided June 27, 1949.)

■ *Harris* v. *State of South Carolina*, 338 U. S. 68, 93 L. ed. Adv. Ops. 1440, 69 S. Ct. 1354, 17 U. S. Law Week 4650. (No. 76, decided June 27, 1949.)

In these cases, the Court reversed convictions of criminal charges that rested upon confessions obtained as a result of prolonged questioning of the accused by relays of police officers.

Mr. Justice FRANKFURTER announced the judgment of the Court in each case, and in each delivered an opinion in which he was joined by Mr. Justice MURPHY and Mr. Justice RUTLEDGE. In the *Watts* case, he notes that a confession of murder was obtained after Watts had been held for six days, during which time he was questioned from 5:30 or 6:00 P.M. until 2:00 or 3:00 A.M. each day without being taken before a magistrate or being advised of his rights under the Constitution. He declares, "A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. . . . To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process."

In the *Turner* case, petitioner was arrested on suspicion of murder by officers who had no warrant and who did not inform the petitioner why he was being arrested. He was questioned in a manner similar to the interrogation in the *Watts* case. Mr. Justice FRANKFURTER declared that the *Watts* case was decisive of the issue and that the conviction had to be reversed.

In the *Harris* case, on similar facts, the state Supreme Court, after a "conscientious effort" to measure the circumstances under which the confession was obtained, concluded that it was not the product of undue pressure. "We are constrained to disagree", Mr. Justice FRANKFURTER says, and the *Watts* case is cited as controlling.

Mr. Justice DOUGLAS wrote a separate concurring opinion in each case setting forth his version of the facts and stating his reasons for reversal. In the *Watts* case, he notes, "Detention without arraignment is a time-honored method for keeping an accused under the exclusive control of the police. . . . We should unequivocally condemn the procedure and stand ready to outlaw, as we did in *Malinski* v. *New York*, 324 U. S. 401, and *Haley* v. *Ohio*, 332 U. S. 596, any confession obtained during the period of the unlawful detention."

Mr. Justice BLACK concurred in the judgment of the Court in each case on the authority of *Chambers* v. *State of Florida*, 309 U. S. 227 (1940), and *Ashcraft* v. *State of Tennessee*, 322 U. S. 143 (1944).

Mr. Justice JACKSON wrote an opinion, which appears at 338 U. S. 57, 93 L. ed. Adv. Ops. 1447, 69 S. Ct. 1357, 17 U. S. Law Week 4651, concurring in the result in the *Watts* case and dissenting in the *Turner* and *Harris* cases. He notes that in each of the cases there was reasonable ground to suspect the accused but not enough legal evidence to charge him with guilt. In each, the police attempted to meet the situation by taking the suspect into custody and interrogating him. The fact that the suspect in none of the cases had, or was advised of his right to get, counsel presents a real dilemma, he says, since counsel would undoubtedly have advised him to make no statement. He declares that the question is whether the accused has the right to be judged upon the facts, or upon only such evidence as he cannot conceal from the authorities who cannot compel him to testify in court and also cannot question him before. He says that if Mr. Justice FRANKFURTER's opinion in the *Watts* case were based solely on the State's admission of the treatment of Watts, he would not disagree. "[I]f ultimate quest in a criminal trial is the truth and if the circumstances indicate no violence or threats of it, should society be deprived of the suspect's help in solving a crime merely because he was confined and questioned when uncounseled?" he asks.

The CHIEF JUSTICE, Mr. Justice REED and Mr. Justice BURTON dissented in each case "in view of the consideration given to the evidence by the State Courts and the conclusion reached".

Y.

The cases were argued by Thurgood Marshall and Franklin H. Williams for Watts, and by Frank E. Coughlin for the State of Indiana, in No. 610; by Edwin P. Rome for Turner, and by Colbert C. McClain for the Commonwealth of Pennsylvania, in No. 107; and by Julian B. Salley, Jr., and Leonard A. Williamson for Harris, and by B. D. Carter for the State of South Carolina, in No. 76.

CONSTITUTIONAL LAW

Equal Protection of the Laws—State Tax on Foreign Corporation's Intangible Property Having No Situs in State Held Unconstitutional Where Domestic Corporations Were Not So Taxed

■ *Wheeling Steel Corporation* v. *Glander, National Distillers Products Corporation, New York* v. *Glander*, 337 U. S. 562, 93 L. ed. Adv. Ops. 1234, 69 S. Ct. 1291, 17 U. S. Law Week 4558. (Nos. 447 and 448, decided June 20, 1949.)

Appellant corporations are corporations organized under the laws of Delaware and Virginia respectively. Each is licensed to do business in Ohio, and each solicits sales in Ohio, the contracts of sale being subject to acceptance or rejection at the home office located in another state. Each bills and collects all accounts from the home office. These cases present the question whether an Ohio *ad valorem* tax against certain intangible property, consisting of notes,

accounts receivable and prepaid insurance, of the corporations, violated the Federal Constitution. The Ohio Board of Tax Appeals sustained a tax upon the receivables of each corporation on the ground that they "arose in the conduct of its business in the State of Ohio by the sale of its products from a stock of goods located in this State". The tax was upheld by the state Supreme Court.

Mr. Justice JACKSON delivered the opinion of the Supreme Court reversing. Noting that it was stipulated that appellants had paid all franchise and other taxes required by Ohio for admission to do business in that state, he said that the tax discriminates between Ohio and foreign corporations, since if both an Ohio and a foreign corporation own accounts receivable from the same out-of-state customer for two lots of the same kind of commodity, both shipped from a manufacturing plant in Ohio and both sold out of Ohio by an agent having an office in another state, the foreign corporation is subject to the tax, under the interpretation of the Ohio Supreme Court, while the Ohio corporation is not. This is a denial of equal protection, he says.

Mr. Justice JACKSON also wrote a separate opinion "to complete the record by pointing out why . . . he assumed without discussion that the protections of the Fourteenth Amendment are available to a corporation." This question was not raised below, he said, and had been settled since *Santa Clara Company* v. *Southern Pacific Company*, 118 U. S. 394 (1886). In view of the record, he said, it was not necessary for the Court to review the question.

Mr. Justice DOUGLAS, joined by Mr. Justice BLACK, dissented on the ground that the corporations here had no standing in the case since they were not "persons" within the meaning of the Fourteenth Amendment. He declares that the *Santa Clara* case has no support in history, logic or reason, and notes that the Court wrote no opinion on the point in the case. After reviewing the history of *Santa Clara Company* v. *Southern Pacific Company*, he declares that he is of the opinion that it should be overruled. Y.

The cases were argued by John M. Caren for the Wheeling Steel Corporation, by Charles H. Tuttle for the National Distillers Products Corporation, and by W. H. Annat for Glander.

COURTS

State Statute Making Plaintiff in Stockholder's Derivative Action Liable for Expenses If Unsuccessful and Requiring Security Is Applicable to Such Actions Brought in Federal Courts on Diversity Ground

■ *Cohen* v. *Beneficial Industrial Loan Corporation, Beneficial Industrial Loan Corporation* v. *Smith*, 337 U. S. 541, 93 L. ed. Adv. Ops. 1221, 69 S. Ct. 1221, 17 U. S. Law Week 4530. (Nos. 442 and 512, decided June 20, 1949.)

This case was a further application of the doctrine of *Erie Railroad* v. *Tompkins*, 304 U. S. 64 (1938). Cohen brought a stockholder's derivative suit in 1943 in the District Court for New Jersey on behalf of the Beneficial Industrial Loan Corporation, a Delaware corporation. The basis of federal jurisdiction was diversity of citizenship. In 1945, New Jersey enacted a statute that made the plaintiff in such an action liable for the defendant's expenses and attorney's fees of the corporation if he failed to make good the complaint and owned less than 5 per cent of the stock or stock of a market value of less than $50,000. The statute applied to actions then pending, and entitled the company to security for the expenses of such a plaintiff before the action could be further prosecuted. The District Court held that the state enactment was not applicable to an action in a federal court. The Court of Appeals reversed.

Mr. Justice JACKSON delivered the opinion of the Court which held the statute applicable to diversity suits in federal courts. He first determines that the decision is appealable, since it is "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." He also dismisses Cohen's contentions that the New Jersey statute violates the Federal Constitution, observing that the statute provides for payment of "reasonable expenses", that there is no denial of equal protection in selecting holders of less than 5 per cent of the stock or $50,000 in market value as those subjected to liability and required to furnish security, and that the statute had no retroactive effect, since it merely provided for a stay of proceedings until the plaintiff furnished security for expense incurred in the future.

Then, citing *Erie* v. *Tompkins* as supplemented by *Guaranty Trust Company* v. *York*, 326 U. S. 99 (1945), he declares that those cases stand for the proposition that "in diversity cases the federal court administers the state system of law in all except details related to its own conduct of business." The statute is not merely a regulation of procedure, he continues, because it creates a new liability where none existed before. "We do not think a statute which so conditions the stockholder's action can be disregarded by a federal court as a mere procedural device", he declares.

Mr. Justice DOUGLAS, joined by Mr. Justice FRANKFURTER, wrote an opinion dissenting in part. He declares, "This New Jersey statute does not add one iota to nor subtract one iota from that cause of action. . . . [It] regulates only the procedure for instituting a particular cause of action and hence need not be applied in this diversity suit in the federal court."

Mr. Justice RUTLEDGE dissented unqualifiedly in an opinion in which he says that he agrees with Mr. Justice DOUGLAS. He declares that the control of diversity litigation belongs to the Congress and not to the states, and that the statute here is too close to controlling the incidents of litigation rather than its outcome to be identified with the former. Y.

The cases were argued by Philip B. Kurland and Charles Hershenstein for Cohen, and by John M.

Harlan for the Beneficial Industrial Loan Corporation.

COURTS

Cause of Action in Diversity Case Held Barred by Applicable State Law Under Which Statute of Limitations Is Not Tolled Until Serving Summons Though Action Would Have Been Deemed Commenced Within Statutory Period under Federal Rules Which Make Filing of Complaint Determinative

■ *Ragan* v. *Merchants Transfer & Warehouse Company, Inc.*, 337 U. S. 530, 93 L. ed. Adv. Ops. 1248, 69 S. Ct. 1233, 17 U. S. Law Week 4564. (No. 522, decided June 20, 1949.)

This was another case involving the doctrine of *Erie Railroad* v. *Tompkins*, 304 U. S. 64 (1938). On October 1, 1943, Ragan was injured in a highway accident. On September 4, 1945, he filed a complaint in the United States District Court for Kansas. Kansas has a two-year statute of limitations for such tort claims and a statute declaring that an action shall be deemed commenced at the date of the service of the summons. The summons was not served until December 28, 1945. Ragan contended that filing the complaint tolled the statute; the company contended that under Kansas law the statute was not tolled until a summons was served. The District Court held for Ragan, and the Court of Appeals reversed on the ground that the Kansas requirement for service of summons within the statutory period was an integral part of the statute of limitations. The court cited *Guaranty Trust Company* v. *York*, 326 U. S. 99 (1945) as controlling.

Mr. Justice DOUGLAS wrote the opinion of the Court affirming. He declares that the purpose of the *Erie Railroad* case was to prevent variation in local laws merely because enforcement of local rights was sought in federal courts. The cause of action was created by local law in this case, he says, and carries the same burden and is subject to the same defenses in the federal court as in the state court. It accrues and comes to an end when local law so declares, he adds. Otherwise there is a different measure of the cause of action and the principle of the *Erie Railroad* case would be transgressed, he concludes.

Mr. Justice RUTLEDGE dissented with reference to his dissenting opinion in *Cohen* v. *Beneficial Industrial Loan Company, Inc., supra.*

Y.

The case was argued by Cornelius Roach for Ragan, and by Douglas Hudson for the Merchants Transfer & Warehouse Company.

COURTS

State Statute Closing Doors of State Courts to Unregistered Foreign Corporation Held Also To Close Doors of Federal Court in Diversity Action

■ *Woods* v. *Interstate Realty Company*, 337 U. S. 535, 93 L. ed. Adv. Ops. 1245, 69 S. Ct. 1235, 17 U. S. Law Week 4565. (No. 465, decided June 20, 1949.)

This case also dealt with the doctrine of *Erie Railroad* v. *Tompkins*, 304 U. S. 64 (1938). The Interstate Realty Company sued Woods in the United States District Court for a broker's commission. The State of Mississippi has a statute that says that if a corporation does not qualify to do business within the state it "shall not be permitted to bring or maintain any action or suit in any of the courts of this State". The Court of Appeals found that the state law did not intend to foreclose unqualified corporations from resort to federal courts and reversed a dismissal by the District Court.

Mr. Justice DOUGLAS wrote the majority opinion of the Court reversing the Court of Appeals. He cites the *Erie Railroad* decision and a case decided under it, *Guaranty Trust Company* v. *York*, 326 U. S. 99 (1945), to the effect that for purposes of diversity jurisdiction a federal court is "in effect, only another court of the State". A contrary result, he says, would create discriminations against citizens of the state in favor of those authorized to invoke the diversity jurisdiction.

Mr. Justice JACKSON wrote a dissenting opinion. He agrees with the Court of Appeals that the statute did not effect the validity of contracts of unregistered foreign corporations or intend to foreclose resort to federal courts. He reads the majority decision as holding that Mississippi cannot enact a law closing its own courts to such foreign corporations without also closing the federal courts. "[W]e seem to be doing the very thing we profess to avoid; that is, give the state law a different meaning in federal court than the state courts have given it," he adds.

Mr. Justice RUTLEDGE dissented with a reference to his dissenting opinion in *Cohen* v. *Beneficial Industrial Loan Company, Inc., supra*, where he expressed his agreement with the views of Mr. Justice Jackson in the instant case.

Y.

The case was argued by P. H. Eager, Jr., for Woods, and by Phil Stone and John A. Osoinach for the Interstate Realty Company.

PARLIAMENTARY LAW

Presence of Quorum at Beginning of Committee Session Insufficient To Support Conviction of Perjury Committed Later During Absence of Quorum Even Though No Objection To Absence of Quorum Was Made

■ *Christoffel* v. *United States*, 338 U. S. 84, 93 L. ed. Adv. Ops. 1349. 69 S. Ct. 1447, 17 U. S. Law Week 4628. (No. 528, decided June 27, 1949.)

In testimony before the Committee on Education and Labor of the House of Representatives, Christoffel denied that he was a Communist or that he endorsed or supported Communistic programs. As a result of this answer, he was convicted of perjury. On the trial he contended that the committee was not a "competent tribunal" within the meaning of the statute, in that thirteen, a quorum of the committee, were not present at the time that the alleged perjury was committed. The trial court had charged: "If such a committee so met, that is, if thirteen members did meet at the beginning of the afternoon session of March 1, 1947, and thereafter during the progress of the hearing some of them left temporarily or otherwise and no question was raised as to the lack of a quorum,

then the fact that the majority did not remain there would not affect . . . the existence of that committee as a competent tribunal". On certiorari Christoffel assigned this as error.

Mr. Justice MURPHY delivered the opinion of the Court reversing the conviction. He notes that the Constitution provides that each house of Congress "may determine the Rules of its Proceedings". House rules require a quorum on the floor of the House to transact business, he says, and that rule applies to House committees under the Legislative Reorganization Act of 1946, 60 Stat. 812. While no one but a member can raise the question in the committee, he continues, "In a criminal case affecting the rights of one not a member, the occasion of trial is an appropriate one for petitioner to raise the question." The question then is what rules the House has adopted and whether they have been followed, he says. An element of the crime here charged is the presence of a competent tribunal, he goes on, and the House insists that to be such a tribunal, a committee must consist of a quorum. To charge that the requirement is satisfied by a finding that a quorum was present two or three hours before defendant offered his testimony in the face of evidence that there was no quorum when the testimony was offered is to say that no quorum need be present when the offense was committed, and this is contrary to the rules and practices of the Congress, he says.

Mr. Justice JACKSON wrote a dissenting opinion in which he was joined by the CHIEF JUSTICE, Mr. Justice REED and Mr. Justice BURTON. Congress may declare that a majority constitutes a quorum for certain purposes and that a different number is sufficient for others, he says. The record shows a quorum present when the session began, he continues, and no one had raised the point of no quorum up to the time of giving the testimony. All parliamentary authorities agree, he declares, that a quorum is required for action, and that the customary law of parliamentary bodies is that the presence of a quorum having been ascertained at the beginning of a session, that record stands unless and until the point of no quorum is raised. The House has adopted this rule and practice, he says. The Court should not put out a doctrine, he declares, "by which every Congressional Act or Committee action, and perhaps every judgment here, can be overturned on oral testimony of interested parties."

Y.

The case was argued by O. John Rogge for Christoffel, and by Alexander M. Campbell for the United States.

PUBLIC UTILITIES

Federal Power Commission, under Natural Gas Act, Has No Power To Prevent Sale of Gas Leases by Company Subject to Act

■ *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U. S. 498, 93 L. ed. Adv. Ops. 1251, 69 S. Ct. 1251, 17 U. S. Law Week 4577. (No. 558, decided June 20, 1949.)

The Panhandle Eastern Pipe Line Company transports and markets natural gas in interstate commerce. On October 11, 1948, pursuant to a written contract, Panhandle transferred to another company gas leases on some 97,000 acres of land in Kansas. Acting under the authority of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717, the Federal Power Commission ordered Panhandle to show cause why it should not be prohibited from transferring the leases without the consent of the Commission and that the *status quo* be maintained. Upon refusal of Panhandle to comply with this order, the Commission instituted suit in the District Court for the District of Delaware seeking an injunction to maintain the *status quo* pending final determination of questions for which hearings had been set by the Commission. The District Court refused to grant an injunction on the ground that there had been no showing of any basis for the relief sought by the Commission. The Court of Appeals for the Third Circuit affirmed, on the ground that the Natural Gas Act excluded "the production or gathering of natural gas" from the jurisdiction of the Commission and left the transfer of gas leases to state regulation.

The Supreme Court affirmed in an opinion delivered by Mr. Justice REED, who declared that the Natural Gas Act did not envisage federal regulation of the entire natural gas field to the limit of constitutional power. Section 1 (b) of the Act denies application of the Act's provisions "to the production or gathering of natural gas". Leases are, of course, an essential part of natural gas production, he remarks, and the words "production or gathering" in Section 1 (b) are to be given their natural and clear meaning. He continues, "The primary duty of the Commission is to fix just and reasonable rates for the transportation and sale of natural gas in interstate commerce for resale. For this purpose the Court permitted the Commission to examine and consider the cost of production and gathering. The use of such data for rate making is not a precedent for regulation of any part of production or marketing." The Act was designed to supplement state power to produce a comprehensive regulation of the industry, he says, and neither the state nor federal regulatory bodies were supposed to encroach upon the jurisdiction of the other.

Mr. Justice MURPHY took no part in the consideration or decision of the case.

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE concurred, wrote a dissenting opinion. He says that in the Act, Congress declared it "necessary in the public interest" for the Federal Government to regulate the natural gas companies engaged in interstate transportation and sale of natural gas. The decision of the majority leaves the Commission "impotent to protect the public's interest in having interstate companies maintain adequate gas reserves", he declares, since it deprives the Commission of power to regulate ownership of gas-reserve properties which are indis-

pensable to proper service for interstate customers. He points to Section 7 (b) of the Act, which denies a company power to "abandon all or any portion of its facilities subject to the jurisdiction of the Commission". "It seems inconceivable that Congress would have passed an Act to regulate natural gas companies with a wholly neutralizing exception to bar regulation of the gas reserves upon which the whole gas business depended", he concludes. Y.

The case was argued by Bradford Ross for the Commission, and by Robert P. Patterson and Jeff A. Robertson for the company.

SEAMEN

General Agent Managing Shoreside Business of Ship Owned by United States and Operated by War Shipping Administration Is Liable Neither for Injuries of Crew Members or Passengers as Employer Nor for Wages and Maintenance and Cure

■ *Cosmopolitan Shipping Company* v. *McAllister,* 337 U. S. 783, 93 L. ed. Adv. Ops. 1278, 69 S. Ct. 1317, 17 U. S. Law Week 4658. (No. 351, decided June 27, 1949.)

■ *Weade* v. *Dichmann, Wright & Pugh, Inc.,* 337 U. S. 801, 93 L. ed. Adv. Ops. 1273, 69 S. Ct. 1326, 17 U. S. Law Week 4663. (No. 179, decided June 27, 1949.)

■ *Fink* v. *Shepard Steamship Company, Gaynor* v. *Agwilines, Inc.,* 337 U. S. 810, 93 L. ed. Adv. Ops. 1278, 69 S. Ct. 1330, 17 U. S. Law Week 4665. (Nos. 360 and 430, decided June 27, 1949.)

These cases decided that a general agent who manages the shoreside business of a ship belonging to the United States and operated by the War Shipping Administration is not liable as an employer for damages for physical injuries resulting from the negligence of the masters and officers of the ships.

In No. 351, McAllister sued the Cosmopolitan Steamship Company for damages for injuries which followed poliomyelitis and were allegedly caused by the negligence of the company's agents. McAllister was a member of the crew of the ship managed by the company under the terms of the wartime standard form of agency agreement, GAA 4-4-42, which governed certain phases of the business of ships owned by the United States and operated by the War Shipping Administration. Upon trial in the district court, the jury awarded a verdict for $100,000. The Court of Appeals for the Second Circuit affirmed, relying upon *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707 (1946).

The Supreme Court reversed in an opinion written by Mr. Justice REED. He discusses the effect upon the case of the War Shipping Administration (Clarification) Act, 57 Stat. 45, 50 U. S. C. Appendix § 1291, and the Court's decision in *Caldarola* v. *Eckert,* 332 U. S. 155 (1947), in which the *Hust* case was distinguished. Noting that the latter rested upon the theory that general agents for the United States under the standard agreement form GAA 4-4-42 were employers of seamen injured upon ships managed by them, he declares that the *Caldarola* decision undermined *Hust.* The issue in the instant case, he says, is whether the Jones Act 41 Stat. 1007, 46 U. S. C. § 688, "requires or permits a holding that the general agent under the contract here in question is an employer" under the Act. He points out that, under the Jones Act, the seaman's remedy permits him to demand a jury trial, while, if the Government is the employer, his remedy is in admiralty without a jury. *Caldarola,* he continues, held that such general agents were not in such possession and control of the vessel as to make them liable under New York law to an invitee for injuries arising from negligence in its maintenance. "We do not think it consistent to hold that the general agent has enough 'possession and control' to be an employer under the Jones Act but not enough to be responsible for maintenance under New York law", he says. In view of *Caldarola* and the uncertainty as to remedies generated by *Hust* and *Caldarola,* and the desirability of clarifying the position of the Government as an employer through the War Shipping Administration, he declares that the *Hust* case should be and is overruled. An examination of the terms of the standard contract form and the actual conduct of the parties, he says, "demonstrates that the United States had retained for the entire voyage the possession, management, and navigation of the vessel and control of the ship's officers and crew to the exclusion of the general agent". He holds that the company's duties were expressly and intentionally limited to those of a ship's husband who has been engaged to take care of the shoreside business of the ship. This, coupled with the language of the shipping articles, makes it clear that McAllister was employed by the Government and not by the company, he says, and accordingly the latter is not liable for injuries caused by the negligence of the master or crew.

In No. 179, in an opinion by Mr. Justice REED, the Court decided that a company managing a vessel under a contract similar to that in the McAllister case was not liable in a negligence action to passengers who were injured as a result of the misconduct of a crew member. The trial court had denied the company's motion for judgment notwithstanding verdict, relying upon *Hust* as determinative of the liability of the company as employer, he notes. The Court of Appeals for the Fourth Circuit reversed, citing the *Caldarola* case. In view of the decision in the *McAllister* case, he declares, the trial court was in error in instructing the jury that the company was liable as a common carrier. He rejects a contention that the company was independently liable for its negligence as agent in procuring unsuitable crew members, on the ground that it was not relied on at the trial and cannot be urged at this point. He expresses no opinion as to the separate liability of the company as agent. The judgment of the Court of Appeals is affirmed, modified, in view of the undetermined issue as to the company's negligence, to eliminate the direction to enter judgment for it.

In No. 360, on facts similar to

Cosmopolitan Steamship Company v. *McAllister*, Mr. Justice REED again speaking for the Court, declares that the question is identical with that in the *McAllister* case, and that the opinion there is applicable here.

In No. 430, the right to wages and maintenance and cure was at issue under the standard agency contract form. The *McAllister* and *Fink* (No. 360) opinions are determinative, Mr. Justice REED declares. Since the right to maintenance and cure is "annexed to the employment", and since only an employer is liable for wages, the judgment in favor of the company in No. 430 must be affirmed.

Mr. Justice BLACK, Mr. Justice DOUGLAS, Mr. Justice MURPHY and Mr. Justice RUTLEDGE dissented without opinion in each case. Y.

The cases were argued by Leavenworth Colby for the company, and by Jacob Rassner for McAllister, in No. 351; by William E. Leahy for Weade, and by Leavenworth Colby for the company, in No. 179; by James Landye for Fink, Abraham E. Freedman for Gaynor, and by Leavenworth Colby for the companies, in Nos. 360 and 430.

WAR

Since Selective Service Act Does Not Create a Seniority System for Veterans but Merely Recognizes System's Operation as Part of Collective Bargaining Process, Collective Bargaining May Defer Veterans' Seniority for Legitimate Union Purposes

■ *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U. S. 521, 93 L. ed. Adv. Ops. 1201, 69 S. Ct. 1287, 17 U. S. Law Week 4567. (No. 333, decided June 20, 1949.)

This was a suit brought by three veterans to obtain compensation for a period of a lay-off while employed at Lockheed Aircraft Corporation. The veterans were members of the petitioner labor union when they entered the Armed Forces early in the war, and remained members throughout the controversy. In 1945, the union made a new agreement with Lockheed which provided that "Union Chairmen who have acquired seniority shall be deemed to have top seniority as long as they remain Chairmen". In 1946, after the veterans had returned to Lockheed from the war, they were laid off and union chairmen junior to them were retained. The District Court upheld the veterans' contention that this violated Section 8 of the Selective Service Act of 1940, which provides that a person inducted into the Armed Forces "shall be considered as having been on furlough or leave of absence during his period of training and service [and] . . . shall be . . . restored without loss of seniority". The Court of Appeals for the Ninth Circuit affirmed.

Mr. Justice FRANKFURTER, speaking for the Court, reversed. He notes that Section 8 of the Act does not define "seniority", and says that this indicates that Congress was not creating a seniority system but was merely recognizing its operation as part of the process of collective bargaining. "It is of the essence of collective bargaining that it is a continuous process," he says. Seniority rights derive their scope and significance from union contracts, he continues, and "it would be an undue restriction of the process of collective bargaining . . . to forbid changes in collective bargaining arrangements which secure a fixed tenure for union chairmen, whereby veterans as well as nonveterans are benefited by promoting greater protection of their rights". Y.

Mr. Justice DOUGLAS concurred in the result.

The case was argued by Maurice J. Hindin for the Aeronautical Industrial District Lodge 727, by H. Graham Morison for the veterans, and by Robert H. Canan for Lockheed.

WAR

Title to Enemy Alien Property Frozen by Executive Order under Trading with the Enemy Act Was Not Transferred by Subsequent Judicial Order of State Court Finally Appointing Receiver—Under New York Law Temporary Receiver Did Not Take Title on Appointment

■ *Propper* v. *Clark*, 337 U. S. 472, 93 L. ed. Adv. Ops. 1206, 69 S. Ct. 1333, 17 U. S. Law Week 4570. (No. 390, decided June 20, 1949.)

This was a suit instituted in the United States District Court by the Alien Property Custodian to obtain the payment and a declaration of title in him, as against Propper, of certain royalties owed by the American Society of Composers, Authors and Publishers (A.S.C.A.P.) to Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (A.K.M.), an Austrian association. On June 12, 1941, Propper was appointed temporary receiver of that association under a New York statute that provides for liquidation of assets of a foreign corporation that has ceased to do business in the state. On June 14, 1941, the President, acting under the Trading with the Enemy Act, promulgated Executive Order No. 8785, which prohibited transfer of Austrian property without a license from the Secretary of the Treasury. On July 29, Propper began action in the New York courts against A.S.C.A.P. to recover the royalties, and on September 29, he was appointed permanent receiver of A.K.M. by the New York Supreme Court. On September 4, 1943, the Custodian issued vesting order number 2097, under which he claims title to the royalties. The District Court held that the title was in the Custodian and the Court of Appeals for the Second Circuit affirmed.

The Supreme Court affirmed in an opinion delivered by Mr. Justice REED. He determined that the presidential freezing order (No. 8785), prohibiting transfers of credit of Austrian nationals between "banking institutions", applied to A.S.C.A.P. and petitioner. While it is true, he says, that to make A.S.C.A.P. or Propper a banking institution is a departure from the ordinary conception, they fall within the definition in the order, authorized by Congress when it passed the Trading with the Enemy Act, of "any person holding credits for others as a direct or incidental part of his business".

Turning to the question of the

effect of the freezing order on the subsequent state court order appointing Propper permanent receiver, and assuming for the moment that the petitioner had not already been vested with title, he holds that no change of title was effected by reason of the order making the appointment.

As for the contention that title to the royalties passed to Propper when he became temporary receiver, two days before the freezing order, thus leaving no alien property to be frozen by the order, Mr. Justice REED notes that there is no New York case on the point, and he approves the Court of Appeals' finding, based on New York cases dealing with temporary receiverships in equity, that temporary receivers of the equity or statutory class obtain only a right to possession and not title. He rejects a suggestion that the decision of the federal question should be delayed until the courts of New York have settled the issue of state law.

The CHIEF JUSTICE took no part in the consideration or decision of the case.

Mr. Justice JACKSON dissented on the ground that A.S.C.A.P. is not a banking institution under the definition in the freezing order.

Mr. Justice FRANKFURTER wrote a dissenting opinion, saying that the case should have been remanded to the District Court to retain jurisdiction pending submission to the New York courts of the question as to whether title passed to Propper when he was appointed temporary receiver. "[R]egard for the respective orbits of State and federal tribunals is the best of reasons, as a matter of judicial administration, for requiring a definitive adjudication by the New York courts rather than proceeding on the basis of our own tentative guess as to the meaning of the New York statutes," he declares. Y.

The case was argued by A. Walter Socolow and Joseph M. Cohen for Propper, by David Schwartz for Clark, successor to the Alien Property Custodian, and by Louis D. Frohlich for A.S.C.A.P.

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1950 Annual Meeting and ending at the adjournment of the 1953 Annual Meeting:

Alabama	Missouri
Alaska	New Mexico
California	North Carolina
Florida	North Dakota
Hawaii	Pennsylvania
Kansas	Tennessee
Kentucky	Vermont
Massachusetts	Virginia
	Wisconsin

An election will be held in the State of New Jersey for State Delegate to fill the vacancy in the term expiring at the adjournment of the 1951 Annual Meeting. The State Delegate elected to fill the vacancy will take office immediately upon the certification of his election.

Nominating petitions for all State Delegates to be elected in 1950 must be filed with the Board of Elections not later than April 20, 1950. Petitions received too late for publication in the April JOURNAL (deadline for receipt March 5) cannot be published prior to distribution of ballots, fixed by the Board of Elections for April 27, 1950.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. April 20, 1950.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

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Attorney and Client . . . unlawful practice . . . Rules of the Patent Office cannot legalize conduct in Illinois which would otherwise constitute unlawful practice of law under law of that state.

■ *Chicago Bar Assn.* v. *Kellogg*, Ill. App. Ct., October 31, 1949, Tuohy, P.J.

The Court in this action enjoined defendant, a registered patent attorney who was not a member of the Illinois bar or an attorney at law, from engaging in the following activities found to constitute the unauthorized practice of law: rendering legal opinions relating to the infringement and enforcement of patents and trade-marks, threatening to bring suit in behalf of clients, preparing and filing pleadings or other legal documents in courts of record and administrative tribunals other than the Patent Office, drafting or construing legal documents, contracts, including patent licenses and deeds, assignments or other evidences of transfer of interests in patents or other property (despite use in such instances of forms appended to Patent Office rules) and charging or collecting fees for legal services rendered by him, or by him and others.

At the time of defendant's registration in 1918 on the Patent Office roster of attorneys, applicable Rule 17 permitted qualified nonlawyers to practice before the Patent Office but it was later amended to restrict such practice to attorneys at law. Rejecting defendant's contention that by virtue of such license he was entitled to perform certain legal services before the Patent Office and elsewhere, the Court maintained that the Patent Office could not and had not attempted to invest nonattorneys with the rights, privileges and duties of attorneys at law in contravention of Illinois law as enunciated by the Illinois courts.

The decree was expressed to be without prejudice to defendant's rights "to advise and assist applicants for patents in the presentation and prosecution of their applications for patents before the United States Patent Office", that being the language of Rule 17.

Aviation . . . Civil Aeronautics Act . . . §§ 402(b) and 801 of Act as they relate to delegation of congressional power to executive to issue permits to foreign air carriers held constitutional.

■ *Colonial Airlines, Inc.* v. *Adams et al.*, U.S.D.C., D.C., November 16, 1949, Proctor, C. J., and Morris, J.

In a memorandum opinion by a statutory three-judge court, the majority held constitutional §§ 402 (b) and 801 of the Civil Aeronautics Act of 1938 as they relate to the issuance of permits to foreign air carriers, and ruled that the Act's delegation of authority to the President to issue such permits upon the recommendation of the Civil Aeronautics Board was not an unconstitutional delegation of the power of Congress to regulate foreign commerce. Under § 402 (b) the Board is empowered to make such a recommendation if it finds that "such carrier is fit, willing and able properly to perform such air transportation and to conform to the provisions of the Act and the rules, regulations, and requirements of the Authority hereunder, and that such transportation will be in the public interest." The Court said that it was clear that Congress had provided certain standards of action by the Board and concluded: "As the subject matter of this delegation of power by the Congress to the Board and the President is that of foreign commerce, we do not believe that further standards are necessary to meet constitutional requirements".

In a dissenting opinion, Goldsborough, J., maintained that §§ 402 (b) and 801 were unconstitutional since the standards therein contained, as construed by the United States Supreme Court in *Chicago & Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, were not binding upon the President who could disregard entirely the recommendation of the Board and proceed to act without any standards, limitations or statutory control whatsoever.

Both majority and minority were of the opinion that even though there could be no final determination short of the President, the procedure adopted by plaintiff, an action for an injunction against the Board, was correct.

Citizens . . . naturalization . . . applying rule of "court's own conjecture" alien's occasional indiscretions with unmarried women held not to brand him as person not of "good moral character" so as to preclude naturalization.

■ *Schmidt* v. *U. S.*, C.A. 2d, October 24, 1949, L. Hand, C.J.

The Court in this opinion reversed a ruling of the Immigration and Naturalization Service which refused naturalization to petitioner, a French and German professor at the College of the City of New York, on the ground that, because of admitted in-

EDITOR'S NOTE: The omission of a citation to the United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

discretions with unmarried women "now and then", he had not been a person of "good moral character" for the preceding five years; the petition was granted.

Noting that the law upon the subject was "not free from doubt", the Court observed that the final answer as determined by common standards of morality was not to be found in any decisions, investigations or polls, but rather by resort to the Court's own conjecture. In this connection the Court observed: "It is true that recent investigations have attempted to throw light upon the actual habits of men in the petitioner's position, and they have disclosed—what few people would have doubted in any event—that his practice is far from uncommon; but it does not follow that on this point common practice may not have diverged as much from precept as it often does." Although the Court held in *Estrin* v. *United States*, 80 F. (2d) 105, that a single act of adultery, unexplained and unpalliated, was alone enough to prevent the alien's naturalization, it later ruled that an unmarried man did not forfeit his claim to a "good moral character" where the union involved, although adulterous, was continuous. It was the Court's position in the instant case that it did not make a critical difference that the alien's lapses were "casual, concupiscent and promiscuous, but not adulterous."

(See *U. S.* v. *Cloutier*, U.S.D.C., E. D. Mich., November 4, 1949, Koscinski, J., in which the Court held that an alien who engaged in sexual intercourse with a married man both before and after the date of her naturalization did not possess "good moral character", and cancelled her certificate of naturalization as having been procured when the prescribed qualifications had no existence in fact.)

Conflict of Laws . . . *res ipsa loquitur* . . . doctrine applied by forum where rule of ordinary care obtained though there was no precedent for its application by courts of place of injury where rule of highest degree of care obtained.

■ *Dodson* v. *Maddox* and *Albright*, doing business as *W. E. Maddox Oil Co.*, Mo. Supreme Ct., September 12, 1949, Dalton, C.

Defendants' gasoline truck went into a ditch, and the driver was pinned within the cab. Plaintiff was attempting to rescue the driver when spilled gasoline caught fire; the driver and truck were burned and plaintiff was badly injured. Judgment for plaintiff was affirmed on appeal.

The Court agreed with defendants that no case was made under the "rescue doctrine", since there was no proof that defendants were guilty of negligence toward the driver, and the *res ipsa loquitur* doctrine was inapplicable in this respect. The Court maintained, however, that defendants owed a duty toward plaintiff, who was in the immediate vicinity at the time of the accident, and that defendants' negligence toward plaintiff might be established by application of *res ipsa loquitur*.

A problem of greater difficulty arose from the fact that the accident occurred in Kansas, while the suit was brought in Missouri. Defendants urged that the *res ipsa loquitur* doctrine ought not to have been applied by the Missouri court because it had never been applied to the operation of a motor vehicle by the Kansas Supreme Court and the Kansas law required only ordinary care commensurate with the circumstances as distinguished from the Missouri statutory requirement of the highest degree of care. The Court answered, however, by saying that it had applied the *res ipsa loquitur* doctrine in many cases where the duty was limited to ordinary care.

Constitutional Law . . . due process of law . . . municipal ordinance making it unlawful for any person between certain hours to roam or be upon any street or public place without having and disclosing lawful purpose held constitutional.

■ *City of Portland* v. *Goodwin*, Ore. Supreme Ct., October 18, 1949, Brand, J. (Digested in 18 U. S. Law Week 2210, November 15, 1949).

The Court in this case held that a municipal ordinance making it unlawful for any person between the hours of 1:00 and 5:00 o'clock A.M. "to roam or be upon any street, alley or public place without having and disclosing a lawful purpose" violated neither the due process nor the privileges and immunities clauses of the Fourteenth Amendment. Observing that no case had been cited involving the validity of an ordinance framed in these precise terms, the Court rejected defendants' contentions that the ordinance was void for indefiniteness, that it constituted authority to arrest merely on suspicion, and that it made intent alone, without any overt act, a crime. Although willfulness was not expressly made an element of the offense, the Court would read into the statute the word "knowingly" as an implied element, thus precluding the "absurd" application of the ordinance to one who was "involuntarily" on a street. Stating that it was unable to conceive of a "sane person roaming or being upon the street late at night without some purpose though it may be only for the purpose of going to or from his home or walking in the fresh air", the Court deemed the absence of a lawful purpose the equivalent of the presence of an unlawful purpose. As for the objections to the disclosure of a lawful purpose, the Court maintained that the legality of a person's action did not depend upon the opinion of a policeman and that there was nothing inherently unconstitutional in a statute requiring a person to identify himself or to make a report to an officer in a proper case.

Contracts . . . frustration . . . performance of pre-Pearl Harbor shipping contract excused where United States Maritime Commission, after Pearl Harbor, directed foreign shipowner who had submitted to the ship warrants system to transport wool rather than copra.

■ *L. N. Jackson & Co., Inc.* v. *Royal Norwegian Government*, C.A. 2d, November 10, 1949, Clark, C.J.

In November, 1941, shipping ad-

ministrators of the Norwegian government-in-exile contracted, through an American berth agent, to transport plaintiff's copra from Africa to New York in a Norwegian vessel. Previously, Norway had filed application for the issuance by the United States Maritime Commission of warrants for its ships, when they should come into American waters, pursuant to the Ship Warrants Act of 1941, 55 Stat. 591. The warrants established priority in the use of docking and fueling facilities, and subjected the shipowner to orders of the Commission with respect to voyages, class of cargoes and rates. In December, 1941, the Commission directed that wool, rather than copra, be transported in the vessel; the contract with plaintiff was thereupon cancelled. After an unsuccessful action to recover his damages from the berth agent, plaintiff brought the present action and obtained a judgment, which was reversed on appeal.

The Court, stating that the warrant system was intended to be coercive and that for a vessel of a carrier who did not accept it there was no assurance of its ever docking and unloading, agreed with defendant's theory that performance of the contract was excused by the contrary order of the Commission, in accordance with the rule that " a contractual duty is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prohibited by an administrative order made with due authority by an officer of the United States." The Court rejected plaintiff's argument that defendant bore the risk of failure to foresee and protect against the possibility of such Commission order, in view of the general knowledge of the warrant system, attributable to all connected with American shipping at the time, the drastic effects of Pearl Harbor and the necessity of subordinating private commerce to the necessities of a warring government.

L. Hand, C. J., dissenting, took issue with the statement that plaintiff was charged with notice of the warrant system and maintained that defendant should have had the burden of showing either that (1) the Commission would have compelled the Norwegian government to cancel the contract or (2) that plaintiff would have entered into the contract even had it known that Norway had applied for inclusion in the warrant system. Since the trial below had not gone on this theory, he would have remanded for new trial.

Department of the Air Force . . . regulations adopted regarding Air Force Discharge Review Board and Air Force Disability Review Board.

■ Code of Federal Regulations, Tit. 32, Ch. VII, Pt. 881, §§ 881.16–881.38 (14 Fed. Reg. 6946).

In the *Federal Register* of November 16, 1949, the Department of the Air Force announced the adoption of regulations pertaining to the Air Force Discharge Review Board and the Air Force Disability Review Board. The Discharge Review Board, established to review the type and nature of an officer's or enlisted person's discharge or dismissal, except that resulting from the sentence of a general court martial, is authorized to determine whether the type of discharge received was equitably and properly given. The function of the Air Force Disability Review Board is to review, at the request of an officer retired or released from active service, without pay, for physical disability pursuant to the decision of a retiring board or disposition board, the findings and decisions of such board. The Disability Review Board is charged with ascertaining whether an applicant for review incurred physical disability in line of duty or as an incident of the service. The prescribed regulations cover such matters as the personnel subject to the jurisdiction of the Boards, application for review, convening of the Boards, hearings, findings and conclusions, disposition of proceedings, action upon proceedings and rehearings. In either case the application must be received prior to June 22, 1959, or within fifteen years after the date of the discharge, separation or release, whichever date is later.

Husband and Wife . . . divorce . . . defendant's appearance in divorce action for purpose of attacking court's jurisdiction over subject matter, though attorney subsequently withdraws, is as matter of law, sufficient to make divorce decree unassailable by collateral attack.

■ *Henricks* v. *Henricks*, N. Y. Supreme Ct., App. Div., 1st Dept., October 31, 1949, Van Voorhis, J.

The court below (35 A.B.A.J. 776; September, 1949) had held that a defendant wife's appearance in a divorce action in another state, for the purpose of attacking the court's jurisdiction, subsequently withdrawn, was not as a matter of law "participation" sufficient to render the divorce decree unassailable by collateral attack. It pointed out that the United States Supreme Court had never held that a mere general appearance constituted such "participation". The lower court accordingly refused to enter a summary declaratory judgment that the wife was bound by the foreign decree. On appeal the court reversed. It was stated that the appearance had been for the purpose of attacking the foreign court's jurisdiction over the subject matter and that such an appearance was necessarily a general one despite any contrary label. The withdrawal was said to have been a withdrawal of attorneys from the case rather than a withdrawal of the wife's appearance and Justice Holmes was quoted as having said "a respondent cannot defeat jurisdiction by disappearing". Justice Van Voorhis remarked, "Were the rule otherwise, it would enable parties to appear in courts of sister States, but to make a hasty exit before judgment if met with the judicial frown". It was held to be the settled rule that a general appearance in a divorce action in another state precludes the party appearing from contesting the divorce in a matrimonial action in New York State. Accordingly the Court ex-

pressly held as a matter of law, that the wife could not be heard to contest the foreign decree.

Insurance . . . National Service Life Insurance . . . estate of deceased beneficiary under National Service Life Insurance policy is entitled to receive accrued instalments which fell due prior to beneficiary's death, despite statutory provision that any instalments not paid to beneficiary during his lifetime shall be paid to those next entitled to priority.

■ *Baumet* v. *U. S.*, C.A. 2d, October 28, 1949, Frank, C.J.

The executrix of the estate of the deceased beneficiary under a National Service Life Insurance policy sought to be substituted in the beneficiary's place as intervenor in an action to recover the accrued instalments which fell due prior to the beneficiary's death, in accordance with a finding by the Administrator of the Veterans Administration that the designated beneficiary, rather than the insured's natural father, was entitled to the fund. The payments due the beneficiary were delayed by the Veterans Administration pending determination of the suit instituted by the father, in which the designated beneficiary had filed a cross claim for payment of the proceeds of the policy. The beneficiary died, however, before the action came to trial. The lower court denied the motion to substitute the executrix and held that, in view of §§ 602 (i) and (j) of the National Service Life Insurance Act of 1940, the beneficiary's claims under the policy were extinguished by his death and the accrued instalments did not inure to his estate. The statutory provisions relied upon condition the beneficiary's right to payment of any instalments upon his "being alive to receive such payments", and provide that any instalments "not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority."

The Court on appeal reversed, pointing out that the statute did not condition the right to payment upon the beneficiary's being alive when such payments happened to be made but "upon his being alive to receive such payments" and that all the other provisions of the statute on which the District Court relied must be read in the light of that language.

Monopoly . . . Sherman Act . . . Southern California fishermen held "independent businessmen" and hence not protected by Clayton Act against conviction of antitrust violation by price fixing under guise of unionization.

■ *Local 36 of International Fishermen & Allied Workers of America* v. *U. S.*, C. A. 9th, September 28, 1949, Fee, J. (Digested in 18 U. S. Law Week 2177, October 25, 1949).

Defendants organized a "labor union" of fishermen, encompassing some 75 per cent of the fishermen in the Southern California fishing area, which sought to establish uniform prices to be paid by fish dealers; noncoöperating dealers and fishermen were subjected to boycott, picketing and other forms of pressure. This organization was assailed, in a criminal action brought by indictment, as a price-fixing conspiracy in violation of the antitrust laws. Conviction was affirmed on appeal.

A principal question, bearing on sufficiency of both indictment and evidence, was whether the fishermen were independent businessmen, as contended by the Government, or were "working, original producers combined for the purpose of fixing the price of the products of their own labor" and therefore protected by the Clayton and Norris-La Guardia Acts as a labor union, and by the Fishermen's Marketing Act as "members of a coöperative." The Court found that many of the members of the "union" owned and operated their own boats and gear, meeting the expenses incident thereto from the proceeds of sale. The "crew", if any, commonly received as compensation an agreed-upon share of each day's proceeds, and hence were deemed joint adventurers. The operator or captain of the boat bargained with the fish dealer for the price for the day's catch. The fishermen were not subject to the orders or directions of any dealer, and were not obligated to deal each day with the same dealer; conduct of the fishing operations was entirely a matter for determination within the boat.

Against this background, the Court maintained that it could not have been found that the fishermen were employees of the dealers, but only that they were independent businessmen. Moreover, since the purposes of the concert of action went beyond noncoercive negotiation of price with the dealers, and included exclusion of noncoöperating fishermen from the market and denial of fish to noncoöperating dealers, the Fishermen's Marketing Act offered no protection.

Furthermore, the Court observed that, even if the price fixing conduct was deemed legal when done by a labor union, the instant combination would nevertheless be illegal whether treated as a combination of boatowners with their fishermen employees, of boatowners and other fishermen with certain dealers, or of members of a marketing coöperative collaborating with nonmembers.

Radio Communication . . . television censorship . . . state censorship of motion picture film intended to be broadcast by television held invalid as precluded by full federal occupation of field of radio and television.

■ *Dumont Laboratories, Inc.* v. *Carroll*, U.S.D.C., E.D. Pa., October 26, 1949, Kirkpatrick, Ch. J. (Digested in 18 U. S. Law Week 2197, November 8, 1949).

A regulation by the Pennsylvania State Board of Censors requiring that all motion picture film intended to be broadcast by television in the state be submitted to the board for censorship purposes was held invalid in the instant case on the ground that it impinged upon a field of interstate commerce which Congress had preëmpted by the enactment of the Radio Act of 1927 and the Communica-

tions Act of 1934, and was inconsistent with the national policy adopted by Congress for the regulation and control of radio and television. The Court ruled that Congress had completely occupied the field of communication by radio and television and that comprehensive federal regulation precluded any state censorship. The Federal Communications Commission, although denied the power of censorship under § 326 of the Communications Act, was deemed empowered to exercise effective control over the content of programs by virtue of its authority to grant, renew and suspend station licenses, and the fact that this "scheme eliminates one particular method of control, namely, censorship in advance of showing, in favor of a less drastic one does not mean", the Court said, "that that field is left untouched." Although the finding that Congress had fully occupied the field was said to be decisive of the case, the Court was of the further opinion that, even if Congress had not done so, the state regulation would have been invalid because it would constitute an undue and unreasonable burden on interstate commerce in television broadcasting.

Shipping . . . maritime liens . . . title to fuel oil laden in tug's tanks at time of judicial sale of "vessel, her engines, boilers, tackle, apparel, furniture, etc." held to pass to purchaser in priority to oil's attachment by ship's master for unpaid wages.

■ *Moore* v. *Martin Marine Transportation Co. et al.*, C. A. 4th, November 3, 1949, Dobie, C. J. (Digested in 18 U. S. Law Week 2214, November 15, 1949).

The question presented was whether the fuel oil laden in the tanks of a tug at the time she was sold pursuant to a libel *in rem* was a part of the "vessel, her engines, boilers, tackle, apparel, furniture, etc." so as to pass title to the purchaser in priority to the attachment of the oil by the ship's master for unpaid wages.

The Court held that title to the oil passed to the tug's purchaser under the judicial sale so as to preclude attachment by the master. Rejecting the distinction made in *Chesapeake Stevedoring Co.* v. *Steamship Dalana*, an unreported decision rendered in 1923 in the Eastern District of Virginia, that stores of a vessel which are consumed in the use are not subject to liens *in rem* as are machinery, tackle and other permanent equipment, the Court ruled that consumable stores as well as permanent equipment should be held subject to liens *in rem* against the vessel on the same principle that they are held to be covered by insurance on the vessel or ordinarily to pass with the vessel when she is sold. "To deprive an oil-burning vessel of her fuel oil", the Court stated, "is to deprive the ship of any means of motion and to negative the very purposes for which a ship is built and launched."

United States . . . Federal Tort Claims Act . . . executrix of soldier killed while on active duty cannot maintain wrongful death action under act.

■ *Feres* v. *U. S.*, C.A. 2d, November 4, 1949, A.N. Hand, C.J.

In a wrongful death action brought under the Federal Tort Claims Act by the executrix of a serviceman who was killed in a barracks fire while on active duty, the Court denied recovery on the theory that injuries to military personnel on active duty are not covered by the Act. The instant case was distinguished from *United States* v. *Brooks*, 337 U. S. 49 (1949), in which the United States Supreme Court allowed recovery on behalf of two soldiers who were injured in a collision with an army truck, since the soldiers in that case were on furlough at the time. Opinion was expressly reserved in the *Brooks* case as to the question presented where the accident is due to the claimant's military service. Stating that such a question was in issue here, the Court maintained that "if more than the pension system had been contemplated to recompense soldiers engaged in military service we think that Congress would not have left such relief to be implied from the general terms of the Tort Claims Act, but would have specifically provided for it." The Court pointed out that the twelve exceptions to the Act relate to the cause of the injury rather than to the character of a claimant, and hence do not mention soldiers specifically. The omission upon passage of the Act of a thirteenth exception which had been provided in the bill in the case of claims for which compensation is provided by the Federal Employees Compensation Act or by the World War Veterans Act of 1924 seemed to the Court to have been based on the fact that the exception was unnecessary and was therefore not deemed sufficiently significant by the Court to require a contrary conclusion in this case.

See *contra*, *Griggs* v. *U. S.* immediately following.

United States . . . Federal Tort Claims Act . . . complaint sustained where executrix of soldier alleged death arose from negligence of army surgeons while decedent was on active but not combat duty.

■ *Griggs* v. *U. S.*, C.A. 10th, November 16, 1949, Murrah, C.J.

The Court in this case held that the Federal Tort Claims Act permits suit against the United States by the executrix of a soldier who, while on active but not combat duty, was killed through the negligence of army surgeons. Murrah, C. J., took the position that there was nothing in the context of the Act or its legislative history justifying judicial limitation upon the claims of servicemen. The omission upon passage of the Act of an exception as to claims of military personnel growing out of the government-soldier relationship was construed to indicate that Congress intended the Act to cover service-connected injuries.

Huxman, C. J., dissented on the basis of the reasoning in *Jefferson* v. *U. S.*, 77 F. Supp. 706, 34 A.B.A.J. 607, July, 1948, and maintained that the Act was not intended to cover service-connected disabilities sustained by military personnel while in service.

See *contra*, *Feres* v. *U. S.*, immediately preceding.

United States . . . Federal Tort Claims Act . . . recovery of damages for burning of potato warehouse through alleged negligence of three inspectors assigned by County Agricultural Association to examine potatoes for purposes of approving Government loan denied since Association is not federal agency nor inspectors federal employees within terms of Act.

■ *Lavitt et al.* v. *U. S.*, C.A. 2d, November 3, 1949, A.N. Hand, C. J.

Plaintiffs sought damages under the Federal Tort Claims Act for the burning of a potato warehouse and its contents through the alleged negligence of three potato inspectors claimed to have been employees of the United States. The inspectors were assigned to examine the potatoes by a County Agricultural Conservation Association pursuant to plaintiffs' application for a loan on the potatoes under the Government's price support program. The association was the local agricultural committee authorized by statute (16 USC §590 h (b)) to administer the loan program within a designated administrative area and consisted of members elected by the farmers within the area. The inspection expenses were paid for by a preliminary service fee charged the borrower and a subsequent service fee deducted from the amount of the loan. The lower court granted the Government's motion for summary judgment on the ground that the inspectors were not employees of the United States, and dismissed the complaint.

Affirming the judgment on appeal, the Court ruled that the county association was not a "federal agency" or government "corporation" and its inspectors were not "employees of the Government", within the terms of the Act, and hence the United States was not liable for their negligence. It was pointed out that the inspectors were not and could not be selected or discharged by the United States or the Department of Agriculture; to impose a liability based upon such a putative agency would, the Court stated, "stretch governmental responsibility too far and might include all sorts of situations in which the United States required a conditional certification or approval before making a loan." Further, the Government was said to have only a remote interest in the amount of the inspection fees since they were paid by the borrower, as distinguished from a situation where the burden of an inspection fee was directly imposed upon United States property.

Further Proceedings in Cases Reported in this Division

■ The following action has been taken in the United States Supreme Court:

CERTIORARI GRANTED, November 7, 1949: *District of Columbia* v. *Little*—Constitutional Law (35 A.B.A.J. 849; October, 1949).

CERTIORARI GRANTED, November 14, 1949: *Johnson et al.* v. *Eisentrager et al.*—Habeas Corpus (35 A.B.A.J. 500; June, 1949).

CERTIORARI GRANTED AND JUDGMENT REVERSED, November 7, 1949: *Dye* v. *Johnson*—Constitutional Law (35 A.B.A.J. 581; July, 1949).

CERTIORARI DENIED, November 7, 1949: *Sorrentino* v. *U. S.*—Constitutional Law (35 A.B.A.J. 774; September, 1949); *International Union, United Mine Workers of America* v. *U. S.*—Labor Law (34 A.B.A.J. 505, June, 1948; 35 A.B.A.J. 679, August, 1949).

CERTIORARI DENIED, November 14, 1949: *Decker* v. *FTC*—Patents (35 A.B.A.J. 677; August, 1949).

REVERSED, November 7, 1949: *U. S.* v. *Spelar*—United States (34 A.B.A.J. 418, May, 1948; 35 A.B.A.J. 504, June, 1949).

REVERSED AND REMANDED, November 7, 1949: *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*—Venue (34 A.B.A.J. 1132, December, 1948; 35 A.B.A.J. 679, August, 1949).

MOTION TO DISMISS GRANTED AND WRIT OF CERTIORARI DISMISSED, *per curiam*, November 21, 1949: *Eisler* v. *U. S.*—Courts (34 A.B.A.J. 718, 1132;. August, December, 1948).

JUDGMENT OF THE COURT OF APPEALS REVERSED AND THAT OF DISTRICT COURT AFFIRMED, November 21, 1949: *Kingsland* v. *Dorsey*—Attorney and Client (35 A.B.A.J. 232, 585; March, July, 1949).

■ The New York Appellate Division, First Department, on October 31, 1949, held (see *supra*, page 58) that the Special Term should have granted defendant's motion for partial summary judgment declaring Arkansas divorce binding on plaintiff: *Henricks* v. *Hendricks*—Husband and Wife (35 A.B.A.J. 776; September, 1949).

■ The following action has been taken by the United States Court of Appeals for the Second Circuit:

JUDGMENT AFFIRMED IN OPEN COURT, *per curiam*, November 4, 1949: *De Sairigne* v. *Gould*—Venue (35 A.B.A.J. 424; May, 1949).

■ The following action has been taken by the United States Court of Appeals for the District of Columbia, after consideration on the mandate of the Supreme Court:

APPEAL DISMISSED, November 7, 1949: *WJR* v. *FCC*—Radio Communication (34 A.B.A.J. 1050, November, 1948; 35 A.B.A.J. 335, 679, April, August, 1949).

Lawyers *in the News*

J. J. MARDIS

■ J. J. MARDIS, known as "Uncle Babe" to his friends, lawyer, legislator, statesman, humorist and philosopher, was 99 years old on November 18. Born in 1850 and admitted to the Bar in 1885, Mr. MARDIS has been an active practioner for sixty-four years. Within the past year he argued a complicated case before the Supreme Court of Arkansas and on August 16 tried a chancery case in an adjoining county, twenty-five miles distant from his home at Harrisburg, Arkansas.

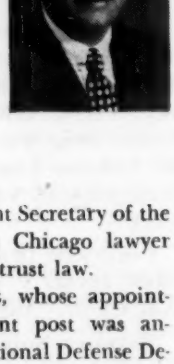
In his 96th year he found himself arguing, without benefit of prior research, a jurisdictional question in the United States District Court for the Eastern District of Arkansas. Unerringly he pierced the armor of his opponent, who is considered one of the most erudite advocates at the Arkansas Bar.

Mr. MARDIS served two terms in the lower house of the Arkansas General Assembly in the ninetys and some ten years later was elected to two terms in the state senate.

A voracious reader, he maintains a discerning interest in local, state and national questions. He is well informed on matters designed to promote the administration of justice, and the objectives of the organized Bar.

Ever kindly to the cubs at the Bar, Senator MARDIS has become a guidepost and beacon which seems as immutable as the stars. His wit and humor enliven the meetings of the local and district Bar, at which he is a regular attendant. Once challenged to a duel, his choice of weapons was "a bucket of slop and a broom".

While in his office daily, Mr. MARDIS now chooses his clients to conserve his energies. Some may say that he is only a country lawyer, but the extent of imprint of his long life upon his neighbors is beyond measurement.



John F. FLOBERG

■ The new Assistant Secretary of the Navy for Air is a Chicago lawyer specializing in antitrust law.

John F. FLOBERG, whose appointment to the vacant post was announced by the National Defense Department November 15, is no stranger to the Navy. He volunteered for naval service a month before the Pearl Harbor attack and served as a deck officer on anti-submarine ships; as executive officer of a sub chaser in the Mediterranean, where he participated in the North Africa, Sicily and Salerno campaigns. In the Pacific he was gunnery officer and executive officer of a destroyer escort, and in that theater he took part in the Philippines, Iwo Jima, Okinawa campaigns, and in the Third Fleet attacks on Japan.

A graduate of Loyola University in Chicago, class of 1936, he received his law degree from Harvard in 1939.

He has been a member of the Association since 1946.

Gordon GRAY

U. S. Army

■ Throughout the Phony War, the World War and the Cold War, the names of the men responsible for the defense of the United States have been on the front pages of newspapers throughout the world.

The 40-year-old lawyer who became Secretary of the Army on June 20 of last year is no exception. Gordon GRAY became Acting Secretary upon the resignation of Kenneth C. Royall on April 27, and was appointed and confirmed Under Secretary and Secretary in succession.

A native of Baltimore, Maryland, Mr. GRAY attended Woodberry Forest School in Virginia and the University of North Carolina, where he was president of Phi Beta Kappa. He received his legal education at Yale, and was admitted to the New York Bar in 1934. After two years' practice in New York City, he went to North Carolina, and was admitted to the Bar of that state in 1936. From 1937 to 1947 he was president of the Pied-

mont Publishing Company and publisher of the *Winston-Salem Journal* and *Twin City Sentinel*.

In 1939, he was elected to the North Carolina Senate, resigning in 1942 to volunteer for service in the Army. Enlisting as a private, he was a captain in the Infantry when he was returned to inactive duty in 1945.

Charles S. LOBINGIER

■ The Library of Congress recently announced the appointment of Charles S. LOBINGIER as Honorary Consultant in Modern Civil Law. In that capacity, Judge LOBINGIER will advise the Library on its legal collections, services and bibliographical aids in the field of modern civil law.

The appointment will give the Library the benefit of Judge LOBINGIER's years of experience in the modern civil law field. He served as a Judge of the Philippine Court of First Instance from 1904 to 1914, and as Judge of the United States Court for China from 1914 to 1924. He was the first judge to serve a full term on the China court, and served the longest of any of its judges. The Chinese government awarded him the Order of Chiao Ho for his services in that country. As a special assistant attorney general, he was detailed to make a survey of Cuban laws in 1926, and was tendered appointment as legal counselor by the Chinese government in 1931.

Judge LOBINGIER has received worldwide recognition in the field of international and comparative law, but his interests are not confined to those fields. He has taught law at the University of Nebraska, the University of the Philippines Law School, the University of California, the Comparative Law School of China, National University (Washington), and at the American University, where next year he will serve as Professor of Roman and Modern Civil Law.

Despite nearly twenty-five years of federal service abroad, Judge LOBINGIER has also found time for activities in his native land. He practiced law in Nebraska for ten years after his admission to the Bar of that state in 1890, and has been an officer of the Securities and Exchange Commission since 1934, in addition to numerous services to legal and other professional and charitable organizations.

He is the author of several legal works, some of which have been translated into foreign languages, and of more than 200 treatises, articles and opinions appearing in legal encyclopedias and magazines.

Judge LOBINGIER delivered the first Samuel Avery Lecture at the University of Nebraska recently.

He is a life member of the Association, which he joined in 1907.

Hubert E. HOWARD

Moffet

■ The new Chairman of the National Munitions Board, Hubert E. HOWARD, is a former practicing lawyer in Chicago. He was named to the Board November 25 by the President.

A graduate of Harvard Law School, the 60-year-old Chicagoan has been chairman of the board of a Chicago coal corporation for a year, and was president of the corporation for nineteen years.

A native of Iowa, Mr. HOWARD served in World War I as commander of a battery of the 331st Field Artillery.

He was Federal Prohibition Director of Illinois from 1919 to 1921, and was appointed to the Illinois Racing Commission in 1940. He is a longtime friend of Defense Secretary Johnson.

John J. McCLOY

Harris & Ewing

■ When Secretary of State Acheson visited Germany recently, he declared that John J. McCLOY, the United States High Commissioner, speaks with "the complete confidence and the full support of the President of the United States and his Secretary of State." Mr. McCLOY's sentiments on our German policy are thus the policy of the United States in Germany.

The 54-year-old lawyer who is the "supreme United States authority in Germany", succeeding Lt. Gen. Lucius D. Clay, is a graduate of Amherst and Harvard Law School. He served as Assistant Secretary of War during World War II, and as President of the International Bank for Reconstruction and Development for two years following the war.

Mr. McCLOY was chosen for the post of High Commissioner for Germany by President Roosevelt in 1945, weeks before the German surrender. He declined, pointing out that Britain, France and the U. S. S. R. would all send generals to head their military governments and that a military man was essential for the post. He recommended the appointment of General Clay. When the General retired this spring, President

Truman again offered him the position, which he accepted.

A captain in the A.E.F. during World War I, Mr. McCLOY refused a commission in the Regular Army. He had already chosen the law as his profession. He returned to Harvard Law School, graduating in 1921. His most celebrated case during his twenty years of practice was the investigation of the Black Tom explosion, which took him the better part of ten years. He was finally successful in proving that the explosion was the work of German saboteurs, and his client recovered $2,000,000 damages from the German Government.

In 1940, Secretary of War Stimson made him his special consultant on German espionage, a post for which his work on the *Black Tom* case made him well qualified. A few months later, he became Assistant Secretary. Perhaps his proudest achievement in that post was his work in organizing the 442d Combat Team, which became the most-decorated unit in the American Armed Forces. He persuaded Secretary Stimson to oppose the Morganthau plan for reducing conquered Germany to an agricultural state.

As High Commissioner, Mr. McCLOY is keenly aware of the difficulty of his task. He believes that Germany must reestablish her industry, and that her economy must be part of an integrated European economy.

Despite his long service in Democratic Administrations, Mr. McCLOY is a Republican, a fact which sometimes embarrassed him when he chanced to overhear discussions of political plans during conversations with high-ranking Democrats. He has been a member of the Association since 1931.

Pendleton BECKLEY

■ Pendleton BECKLEY, an American lawyer practicing private international law in Paris, was made a *chevalier* of the French Legion of Honor it was announced recently. The announcement of the award in the *Journal Officiel de la Republique Francaise* noted that it was conferred for *"Services particulièrement dévoués rendus à la France"*— "Especially devoted service to France".

Mr. BECKLEY went to France in 1920 as an attorney and European trust officer for the American Trust Company. He has been vice president of the *Union Internationale des Avocats* (International Society of Lawyers) and of the *Association des Juristes Etrangers* (Association of Foreign Jurists), and at the beginning of the war he was president of the *Union des Colonies Etrangères en France* (Society of Foreign Colonies in France).

A native of Louisville, Kentucky, Mr. BECKLEY received his LL.B. from the University of Louisville, and served as city attorney from 1911 to 1916. He was Executive Secretary of the Kentucky Council of National Defense during World War I.

A member of the New York, Kentucky and United States Supreme Court Bars, Mr. BECKLEY has been a member of the American Bar Association since 1913.

The quest for justice, as the touchstone of moral law, is the theme of Plato's *Republic*, with its concluding admonition to "hold fast ever to the heavenly." Blackstone, at the outset of his famous *Commentaries on the Laws of England*, asserts flatly that the "law of nature being co-eval with mankind, and dictated by God himself, is of course superior in obligation to any other." The law of nature, as a set of uncodified commands implicitly accepted by the mind and conscience of every reasonable person, is merely the concept of Divine Law under another name. Time and time and again it has operated to overthrow entire systems of positive law.

—Felix Morley, *The Power in the People*
(New York: D. Van Nostrand Company, 1949), page 135

THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn • Editor-in-Charge

■ The powers of the United Nations are not limited to those mentioned explicitly in the Charter of the Organization. They may be broadened by special agreements extending them to new fields or by removing some limitations now contained in the Charter. Not only may the jurisdiction of the International Court of Justice be enlarged by agreements relating to a general class of cases or to a particular case, but also the powers of the General Assembly and the Security Council may be developed in a similar manner by broad agreements covering a large range of questions or by *ad hoc* agreements dealing with a particular dispute or situation.

Various additional powers have by now been conferred upon the United Nations, but most of them have not yet been exercised in practice. The best example of the practical application is the case of the Italian colonies, in which a recommendation of the General Assembly was accepted in advance as binding by all the states concerned. Its history and legal background is traced in this month's column.

The First Binding Decision of the General Assembly of the United Nations

■ The decision of the General Assembly on the future of former Italian colonies is an event of great importance. It constitutes the first exercise by the General Assembly of the power to make a decision binding upon all the nations concerned.

Ordinarily, the General Assembly is restricted to making recommendations which no state is obliged to accept. While some states have shown willingness to accept the recommendations of the General Assembly and to execute them as mandates of world public opinion, other states proved quite obstinate in rejecting repeatedly any recommendations of the General Assembly considered by them as unjustified or unconstitutional. In the latter case, no further action can be taken by the United Nations, though the Security Council may step in if a threat to the peace results from the nonfulfilment of a recommendation of the General Assembly (*e.g.*, in the Palestine question). If there is an actual threat to the peace, the Security Council has the power to decide upon the measures to be taken to remove the threat, and the members of the United Nations have agreed in the Charter "to accept and carry out" such decisions of the Security Council. One may say, therefore, that there is contained in the Charter a method for obtaining binding decisions in case of a threat to the peace of the world. The difficulty in applying this provision arises from the fact that under Article 27 of the Charter it is necessary that all the permanent members of the Security Council should unanimously agree that action should be taken. If one of them considers that a decision of the Security Council would be prejudicial to his own interests or to the interests of one of his friends, he can prevent any action by simply casting a negative vote. If he is willing to defy the wrath of public opinion, he cannot be compelled by any legal means under the Charter to abide by the verdict of the majority. There is no provision in the Charter itself that would permit a binding decision by any organ of the United Nations in the teeth of a determined opposition by one of the permanent members of the Security Council.

The powers of the United Nations under the Charter constitute, however, only the minimum; they can be extended by special agreement between states willing to accept additional obligations. For instance, the United States agreed to withdraw all assistance to Greece and Turkey "if the Security Council of the United Nations finds (with respect to which finding the United States waives the exercise of any veto) or the General Assembly of the United Nations finds that action taken or assistance furnished by the United Nations makes the continuance of assistance by the Government of the United States pursuant to this agreement unnecessary or undesirable." The constitutional question of the power of the Security Council to accept an extension of its powers beyond the confines of the Charter was carefully considered in connection with the special powers conferred upon it by the Italian Peace Treaty with respect to the Free Territory of Trieste. The Security Council rejected Australian objections to such an extension of its powers and agreed to accept the responsibilities devolving upon it under the Treaty (*Security Council, Official Records, Second Year,* pages 4-19, 44-61). This constituted an affirmation of the practice of the Assembly and the Council of the League of Nations which accepted a multitude of functions under an imposing array of treaties. A survey of this practice shows that special agreements can not only increase the powers of international organs but may also provide new methods for the exercise of these powers, including a change in voting conditions prescribed in the original instruments establishing these organs (see the memorandum by J. Nisot, UN Doc. A/AC.18/54). The constitutionality of this practice was affirmed by the Permanent Court of International Justice in its advisory opinion con-

cerning the boundary between Turkey and Iraq (Series B, No. 12, pages 27, 30). It was recently reaffirmed by the General Assembly of the United Nations in its Resolution 267 (III), of April 14, 1949, which recommended "to the Members of the United Nations that in agreements conferring functions on the Security Council such conditions of voting within that body be provided as would to the greatest extent feasible exclude the application of the rule of unanimity of the permanent members" (UN Doc. A/900, page 7).

While the Security Council agreed to the extension of its powers under the Italian Peace Treaty, in practice it proved unable to exercise these powers as it could not agree on the appointment of the Governor of the Free Territory of Trieste. On the other hand, the General Assembly was not only able to assume certain responsibilities under that Treaty but was also capable of exercising them when the need arose.

The provision in question dealt with the disposal of the former Italian colonies in case the four powers concerned should be unable to agree upon their future. In a special annex to the Treaty of Peace with Italy, the four powers (the United States, the United Kingdom, the Union of Socialist Soviet Republics and France) declared that in case of such an impasse "the matter shall be referred to the General Assembly of the United Nations for a recommendation, and the Four Powers agree to accept the recommendation and to take appropriate measures for giving effect to it."

As expected, the four powers were not able to agree and the question was submitted to the General Assembly in September, 1948. After a detailed discussion and after hearing the representatives of the inhabitants of the three territories involved (Libya, Somaliland and Eritrea), a compromise solution based on a British-Italian agreement was defeated in the General Assembly on May 17, 1949. The matter was again considered at the fourth session of the General Assembly, and after another long discussion of various possible solutions, an agreement was reached with respect to two colonies, Libya and Somaliland, and the consideration of the future of the third colony was postponed for another year.

The final decision as to Libya and Somaliland, approved by the General Assembly on November 21, 1949, was as follows:

The General Assembly,

In accordance with Annex XI, paragraph 3, of the Treaty of Peace with Italy, 1947, whereby the Powers concerned have agreed to accept the recommendation of the General Assembly on the disposal of the former Italian Colonies and to take appropriate measures for giving effect to it,

Having taken note of the Report of the Four Power Commission of Investigation, having heard spokesmen of organizations representing substantial sections of opinion in the territories concerned, and having taken into consideration the wishes and welfare of the inhabitants of the territories, the interests of peace and security, the views of the interested Governments and the relevant provisions of the Charter,

A. *With respect to Libya, recommends*

1. That Libya, comprising Cyrenaica, Tripolitania and the Fezzan, shall be constituted an independent and sovereign State;

2. That this independence shall become effective as soon as possible and in any case not later than 1 January 1952;

3. That a constitution for Libya, including the form of the government, shall be determined by representatives of the inhabitants of Cyrenaica, Tripolitania and the Fezzan meeting and consulting together in a National Assembly;

4. That, for the purpose of assisting the people of Libya in the formulation of the constitution and the establishment of an independent Government, there shall be a United Nations Commissioner in Libya appointed by the General Assembly and a Council to aid and advise him;

5. That the United Nations Commissioner in consultation with the Council, shall submit to the Secretary-General an annual report and such other special reports as he may consider necessary. To these reports shall be added any memorandum or document that the United Nations Commissioner or a member of the Council may wish to bring to the attention of the United Nations;

6. That the Council shall consist of ten members, namely;

(a) one representative nominated by the Government of each of the following countries: Egypt, France, Italy, Pakistan, the United Kingdom of Great Britain and Northern Ireland and the United States of America;

(b) one representative of the people of each of the three regions of Libya and one representative of the minorities in Libya;

7. That the United Nations Commissioner shall appoint the representative mentioned in paragraph 6(b), after consultation with the administering Powers, the representatives of the Governments mentioned in paragraph 6(a), leading personalities and representatives of political parties and organizations in the territories concerned;

8. That, in the discharge of his functions, the United Nations Commissioner shall consult and be guided by the advice of the members of his Council, it being understood that he may call upon different members to advise him in respect of different regions or different subjects;

9. That the United Nations Commissioner may offer suggestions to the General Assembly, to the Economic and Social Council and to the Secretary-General as to the measures that the United Nations might adopt during the transitional period regarding the economic and social problems of Libya;

10. That the administering Powers in co-operation with the Commissioner:

(a) Initiate immediately all necessary steps for the transfer of power to a duly constituted independent Government;

(b) Administer the territories for the purpose of assisting in the establishment of Libyan unity and independence, co-operate in the formation of governmental institutions and co-ordinate their activities to this end;

(c) Make an annual report to the General Assembly on the steps taken to implement these recommendations;

11. That upon its establishment as an independent State, Libya be admitted to the United Nations

in accordance with Article 4 of the Charter;

B. *With respect to Italian Somaliland, recommends:*

1. That Italian Somaliland shall be an independent sovereign State;

2. That this independence shall become effective at the end of ten years from the date of the approval of the Trusteeship Agreement by the General Assembly;

3. That during the period mentioned in paragraph 2, Italian Somaliland shall be placed under the International Trusteeship System with Italy as the Administering Authority;

4. That the Administering Authority shall be aided and advised by an Advisory Council composed of representatives of the following States: Colombia, Egypt and the Philippines. The headquarters of the Advisory Council shall be Mogadiscio. The precise terms of reference of the Advisory Council shall be determined in the Trusteeship Agreement and shall include a provision whereby the Trusteeship Council shall invite the States members of the Advisory Council, if they are not members of the Trusteeship Council, to participate without vote in the debates of the Trusteeship Council on any question relating to this territory;

5. That the Trusteeship Council shall negotiate with the Aministering Authority the draft of a Trusteeship Agreement for submission to the General Assembly if possible during the present session, and in any case not later than the fifth regular session;

6. That the Trusteeship Agreement shall include an annex containing a declaration of constitutional principles guaranteeing the rights of the inhabitants of Somaliland and providing for institutions designed to ensure the inauguration, development and subsequent establishment of full self-government;

7. That in the drafting of this declaration the Trusteeship Council and the Administering Authority shall be guided by the annexed text proposed by the Indian delegation;

8. That Italy be invited to undertake provisional administration of the territory

(i) At a time and pursuant to arrangements for the orderly transfer of administration agreed upon between Italy and the United Kingdom, after the Trusteeship Council and Italy have negotiated the draft Trusteeship agreement;

(ii) On condition that Italy gives an undertaking to administer the territory in accordance with the provisions of the Charter relating to the International Trusteeship System and to the Trusteeship Agreement pending approval by the General Assembly of a Trusteeship Agreement for the territory;

9. That the Advisory Council shall commence the discharge of its functions when the Italian Government begins its provisional administration.

ANNEX:

Text Proposed by the Delegation of India

The following constitution shall be annexed to and form part of the Trusteeship Agreement for any of the former Italian Colonies that may be placed under the International Trusteeship System:

1. The sovereignty of the Trust Territory shall be vested in its people and shall be exercised on their behalf by the authorities and in the manner prescribed herein.

2. The executive authority of the Trust Territory shall be exercised by an Administrator appointed by the Administering Authority.

3. To assist him in the discharge of his functions the Administrator shall appoint a Council consisting of five representatives of the principal political parties or organizations in the Trust Territory.

4. In matters relating to defence and foreign affairs, the Administrator shall be responsible to and carry out the directions of the United Nations acting through its appropriate organs. In all other matters, the Administrator shall consult and be guided by the advice of his Council.

5. The legislative authority of the Trust Territory shall normally be exercised by the Administrator with the consent of his Council enlarged by such additional representatives of the people as the Administrator may summon for the purpose. In exceptional circumstances, the Administrator may, subject to the control of the United Nations acting through its appropriate organs, make and promulgate such ordinances as, in his opinion, the circumstances demand.

6. The judicial authority of the Trust Territory shall be exercised by a Supreme Court and courts subordinate thereto. The judges of the Supreme Court shall be appointed by the Administrator but shall hold office during good behavior and shall not be removable except with the consent of the United Nations acting through its appropriate organs.

7. All the authorities of the Trust Territory shall, in the exercise of their respective functions, respect human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

8. The United Nations acting through its appropriate organs may:

(a) make rules to supplement this constitution;

(b) review the administration periodically and amend this constitution so as to establish the Trust Territory as an independent State within a period not exceeding five years.

QUINCTUS: Marius is an example that *a liberal education is peculiarly necessary where power is almost unlimited.*

—Walter Savage Landor, 2 *Imaginary Conversations* 33. Marcus Tullius and Quinctus Cicero. London, J. M. Dent & Co., 1911.

Department of Legislation

Harry W. Jones, Editor-in-Charge

Federal Aid to Education: Constitutional Overtones

■ It has been a recurrent theme in this department of the JOURNAL that questions of constitutional policy are incompletely viewed if considered as exclusively judicial questions and that Congress, too, has an inescapable responsibility on issues of constitutional law. The student of American institutions will often learn at least as much from analyzing the course of congressional action on a legislative proposal raising a serious constitutional issue as from the most meticulous analysis of the Supreme Court decisions on the same constitutional question. The legislative history of proposals for federal aid to education in the first session of the 81st Congress provides an excellent case in point.

In addition to the general question of the propriety of using federal taxing and spending powers to equalize educational opportunities among the states, federal aid to education raises inevitably two issues of constitutional policy which are among the most delicate and trying of the questions passed on by the Supreme Court within recent years. *First,* To what extent, if at all, should government funds be spent to furnish transportation, health and other services for the benefit of students at parochial and other nonpublic schools? *Second,* What is the appropriate way of handling the special problems presented by educational segregation in the Southern states?

The Supreme Court's five-to-four decision in the 1947 *Everson* case indicates sufficiently the difficulties involved in determining the application of the Establishment Clause of the First Amendment to contemporary problems of school financing and administration. The bearing of the Equal Protection Clause on segregated educational systems was before the Supreme Court in 1947 in the *Sipuel* case, and only a rash constitutional lawyer would volunteer to predict the Supreme Court's action in the *Sweatt* and *McLaurin* cases now pending before the Court. There is neither space nor occasion here to undertake a discussion of the merits of the two constitutional issues, generally or in specific relation to federal aid to education. It is the purpose of this short article to describe, as objectively as possible, how the church-schools problem and the segregated-schools problem were handled by the draftsmen, committee members and other Congressmen who participated actively in Senate and House consideration of the federal aid to education proposal.

State Law Would Control in Senate Bill

The bill (S. 246) which passed the Senate on May 5 by a vote of fifty-eight to fifteen embodied a compromise on the issue whether federal funds might be used by a state to provide transportation and other auxiliary services for sectarian-school children as well as public-school children. Section 6 of the Senate bill makes the federal funds paid to a state available for disbursement by the state's public school agencies "for any current expenditure for elementary or secondary school purposes for which educational revenues derived from State or local sources *may legally and constitutionally be expended in such State.*" (Italics added.) On the assumption that the *Everson* case establishes the constitutionality of the expenditure of state funds to furnish auxiliary services, so long as there is no use of public funds to pay teachers' salaries and other maintenance costs of the sectarian schools themselves, this compromise Senate provision would make the constitution and statute law of each state controlling on the question whether federally-supported auxiliary services are to be made available to parochial-school children in that state. This "state policy" compromise survived challenges on the Senate floor from both sides of the controversy. Senator McMahon was unsuccessful in an attempt to amend the bill to add a requirement that free school transportation furnished by any state be made available to all school children "without regard to . . . the character of the school which the child attends". Senator Donnell, on the other side, failed in his effort to have the bill amended to ban the expenditure of federal funds by any state to furnish services for pupils at sectarian schools, irrespective of the state law governing expenditure of the state's own educational funds.

Six days after S. 246 passed the Senate, H.R. 4643 was introduced in the House of Representatives by Chairman Barden of the Special Subcommittee on Federal Aid to Education of the House Committee on Education and Labor. The Barden Bill was carefully drawn to close the door on any possibility of state expenditure of federally-granted funds for sectarian school purposes, even for the furnishing of auxiliary services to parochial-school children. Section 5 of the Barden Bill provides that funds paid a state under the Act may be expended *"only* for current expenditures for *public* elementary and secondary schools within such State." (Italics added.) The term "current expenditures" is elsewhere defined in the Barden Bill as not including expenditures for school transportation or auxiliary health services. Since bus transportation and student health services are

the very items on which there is the strongest case favoring availability of the assistance to church-school children, the difference in approach between the Barden Bill and the compromise Senate provision is perfectly evident.

At the later public hearings of his Subcommittee on S. 246 and H.R. 4643, Representative Barden replied to criticisms of H.R. 4643 with the observation that the Bill was drafted to by-pass the controversial bus transportation issue and that states wishing to provide school bus transportation for sectarian-school children could readily do so with state funds released from other educational uses by federal aid. Sharp differences in point of principle were involved, however, particularly between Representative Barden and Chairman Lesinski of the Committee on Education and Labor, and no action was taken by the full committee during the first session of the 81st Congress, either on the Senate bill or on the Barden substitute.

Bills Also Differ on Segregation Schools Problem

The Senate bill and the Barden Bill also differ significantly in relation to the problem of federal aid to states maintaining segregated school systems. Here, again, the Senate bill reflects a compromise. Educational segregation in certain states is treated as an established fact, and states following a policy of segregation are eligible for federal funds without deduction or penalty of any kind. An antisegregation amendment to the Senate bill, which would have made federal aid available only to states that admit all qualified pupils to their public schools "without regard to race, color, creed, or national origin", was offered by Senator Lodge but rejected by Senate vote of sixty-five to sixteen.

But the Senate bill contains two provisions designed to ensure that the availability of federal funds will cause a substantial improvement in educational standards in the separate Negro schools. The bill expressly requires that a "just and equitable apportionment" of the new federal funds be made to minority race schools, without reduction by the state of the share of state and local revenues now being spent by the state on minority race schools. "Just and equitable apportionment" is defined elsewhere in the bill to mean a proportion of the federally-granted funds "not less than the proportion the minority race bears to the total State population." And the Senate bill further provides that by 1953 each state must be spending a minimum amount, from all sources, of $55 per pupil in all of its public schools, including the schools maintained for Negroes. This longer-range requirement for continued state eligibility is not a guarantee of precise equality of per pupil expenditure, since a state would be eligible for federal aid, even after 1953, if it spent $55 per pupil in the Negro schools and a larger sum per pupil in schools for white children. The limited sources of revenue in most of the states maintaining segregated school systems may, it has been suggested, make this possibility of inequality more theoretical than real.

The Barden Bill, by contrast, contains no provision whatever dealing specifically with the segregated schools problem. There is no long-range eligibility requirement of minimum per pupil expenditure and no provision requiring an equitable apportionment even of federally granted funds. At the subcommittee hearings, Representative Barden strongly opposed the addition to the bill of provisions safeguarding the interests of the separate Negro schools against possible state discrimination in expenditures and suggested the possibility that the imposition of such restrictions on state educational practice might cause some "hardheaded governor" to "tell you to take your money and go back to Washington." It is interesting to compare Representative Barden's strong "state policy" stand on this issue with his opposition to the "state law" compromise of the Senate bill on the expenditure of federal funds for transportation and health services available to parochial-school pupils. Prospects for enactment of federal aid to education legislation depend on a precarious coalition of Administration Democrats, Republicans of the Taft school of thought, and conservative Congressmen from Southern states urgently in need of educational financing help. But, whatever the risks to this odd political line-up, it seems unlikely that the second session of the 81st Congress will see the House pass, or the Senate concur in, a federal aid to education bill which does not include at least the substance of the Senate bill's provisions applicable to segregated school states.

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Supreme Court Stated Nation's Religious Complexion

■ Rather belatedly there comes to my attention a letter in the July issue of the JOURNAL [page 606] from Richardson Blair of Philadelphia, which was captioned "Is the United States a Christian Nation?". His letter was in response to a letter of Samuel D. Menin in the March issue [page 260].

It may be of interest to note that in *Holy Trinity Church* v. *United States*, 143 U. S. 457, 36 L. ed. 226, the Supreme Court of the United States without dissent stated categorically, "This is a Christian Nation". The documentation of this conclusion, which traces the prenatal influences attending the birth of this nation, goes beyond the Mayflower Compact and even unto the commission to Christopher Columbus and should be sufficient to establish without cavil the religious complexion of our nation, at least as viewed by our Supreme Court.

JULIAN P. ALEXANDER
Jackson, Mississippi

The Country Lawyer in the Association

■ I echo the sentiments of T. J. Campbell in his letter to the editor in the October issue of the JOURNAL. The American Bar Association has consistently overlooked the "country lawyer" in the management of its affairs. Does the Association believe that there is no ability or qualities of leadership among its rural brethren? What, if any, function is the "country lawyer" performing in the Association other than paying his $12.00?

HENRY M. FULLER
Portsmouth, New Hampshire

In Disagreement with William Logan Martin

■ I am sure that members of our Association will divide into those who support and those who oppose William Logan Martin in his pungent criticism of Acts of Congress, regulations of federal agencies and decisions of the Supreme Court since 1933, as well as his fear of the development of a "Welfare State". [35 A.B.A.J. 735; September, 1949.]

But I can hardly believe that there will be any division of our members in their chagrin at reading his innuendo that the entire membership of the United Nations, except England and ourselves, are nations who—

> . . . have never breathed the air of freedom and liberty . . . .

How would we answer a demand from Holland, Belgium, Denmark, Norway, Sweden, France, Australia, New Zealand, or our neighbor Canada (to name only a few "foreign" nations) for proof that the "air of freedom and liberty" has always been the exclusive property of ourselves and England and that they, for the past decades, have lived in complete delusion when they conceived that they had been breathing it?

I think our Association should make it clear to our friends and associates abroad that Mr. Martin's broad overstatement in no way represents the position of our distinguished Association of American lawyers.

PHILIP W. AMRAM
Washington, D. C.

Back-to-the-Constitution Movement Advocated

■ I was much surprised to see anybody suggest any new way to the latter day Supreme Court whereby it could further breach the Constitution, but I have noted in the last issue of the JOURNAL that Attorney Grinnell has done just that (August issue, page 648, *et seq.*).

Mr. Grinnell now tells us that Section 2 of Article III does not mean what it says when it states that the Supreme Court's jurisdiction is subject to "such exceptions . . . as the Congress shall make". For instance, he says that "it seems historically preposterous to suggest that Congress could prevent an appeal from state courts to the Supreme Court of the nation on substantial federal questions". He forgets that there were some, if not many, who would have liked the state courts to handle all judicial business and it could not be so "preposterous" if the representatives of the states did limit appeals from state supreme courts. The power of Congress to make "exceptions" is plenary and as complete as it is possible for words to make it. It seems that some of Alice in Wonderland has crept into the thinking of Mr. Grinnell.

While I hold no brief for the Congress, particularly the late ones, except insofar as the South has been able to keep it under control, I do hold one for the Constitution. As I understand history, the *McCardle* case was a reflection on the Court as

well as Congress. It was believed that the decision had been reached to the effect that the laws excepted were unconstitutional, but the decision was withheld until the Congress could act. In any circumstance, I have no doubt that Congress acted with full power.

I should think that Mr. Grinnell would have noted by this time that the Supreme Court does not need any encouragement in the respect above mentioned. In fact, the Constitution has been perverted to the point that many of its makers would scarcely recognize it to be the instrument that came from their hands from a reading of the decisions interpreting it. I am for a back-to-the-Constitution movement and not for further rubberizing it.

GEORGE WASHINGTON WILLIAMS
Baltimore, Maryland

When Appeal or Certiorari Falls on Sunday

▪ In your September issue, page 771, the review of *Union National Bank* v. *Lamb* ignores the important ruling of the Supreme Court, that where the last of the ninety days allowed for appeal or certiorari falls on Sunday, action on the following day is timely. As said by Justice Douglas, the subject is one on which there had been a "contrariety of views", as indicated by three decisions cited as "pro" and five as "contra". As the involved principle might be widely useful, the case seems entitled to notice in the JOURNAL, especially in view of the former conflict between circuits. Another "pro" decision, probably omitted because of its recent date, February 2, 1949, is *Rimmer* v. *United States*, 172 F. (2d) 954, CA 5th.

While No. 6 (a) of the Rules of Civil Procedure was not directly involved, it was treated as pertinent, and the decision in effect follows the principle of construction involved in the provision in that rule as to "any applicable statute". According to the notes of the Advisory Committee, this rule was not new either in state or in federal jurisdiction. Also of interest is the provision in 28 USC 2071 that rules of federal courts in general "shall be consistent with . . . rules of practice and procedure prescribed by the Supreme Court".

FRANK L. LAWRENCE
San Francisco, California

Definition of "Cartel" Still Unwritten

▪ The two letters published in your September issue illustrate rather well, I believe, the confusion which exists among the Bench and Bar because of the lack of a judicial or legal definition of the word "cartel".

Mr. Schmidt's letter quotes a definition which appears in the book *National Interest and Internation Cartels* by Dr. Charles R. Whittlesey, well-known economist and member of the University of Pennsylvania, Wharton School Faculty. This definition appears to have been suggested to the professor by a member of the Staff of the Department of Justice. It is obviously an inaccurate definition of "cartel" to define it as:

> Everything that would be held in conflict with the Anti-trust Laws if carried on within the United States.

Monopoly created solely by a combine or single corporate entity is one of the basic types of restraint of competition proscribed by the Sherman Act. And this type of monopoly most assuredly does not constitute a cartel.

It requires at least two different individuals, corporations or business enterprises to be allied in some restraint of competition before the word cartel can apply.

In Mr. Drake's letter, reference is made to the only judicial decision I have been able to find, in which even a halfhearted and wholly unsuccessful effort has been made to define "cartel". Judge Simon H. Rifkind, of the Southern District of New York, in the anti-trust case against National Lead Company, *et al*, merely cited as a footnote to his decision (July 5, 1945), a definition "suggested" by the United States Attorney. The latter was correct in saying that:

> A combination of producers of any product joined together to control its production, sale and price, and to obtain a monopoly in any particular industry or commodity.

is, in fact, a cartel. But a cartel may be a great deal less and may cover a great many other things, than appear in this definition.

Each single type of restraint of competition listed in this definition, when two or more separate enterprises engage in it, creates a cartel without the necessity that all the types listed be engaged in.

This definition also limits the cartel to "producers of products". This is a completely inaccurate limitation of the meaning of the word. Many of the cartel alliances which have been formed involve services of different varieties, retail and wholesale selling organizations including arrangements between business enterprises other than those which "produce products."

Judge Rifkind, in that same footnote, commented upon the fact that there was no definition of "cartel" in *Words and Phrases* or the Federal Digest. Also that in Bouvier's *Law Dictionary* the only definition is that relating to agreements between belligerents in a state of war. That definition obviously does not refer to the cartel proscribed by our anti-trust laws.

Finally Judge Rifkind had recourse in this footnote to the two cumbersome definitions of cartel which have been proclaimed by two of the foremost defenders of such alliances. One of these was Sir Alfred Mond, organizer of Imperial Chemical Industries, who was defending his company's international cartel agreements with I. G. Farben in Germany and several of the largest American corporations.

The other was Sir Felix J. C. Pole, Chairman of the Associated Electrical Industries, Ltd., of Great Britain, in defense of the great international electrical fixture cartel of which Sir Felix was a directing genius.

Each of the definitions by these apologists for the cartel stressed the purpose of "regulating," rather than "eliminating" competition. To conceal their purpose of softening the

legal significance of the word "cartel" both of these favorable descriptions are so verbose and ambiguous as to provide not an accurate definition but a plea in extenuation, or of avoidance of the issue.

In the body of his decision in this case Judge Rifkind states his dilemma, at least by implication, due to the lack of a legal definition of the word. He stated that it was of little significance whether the form of association created by the defendants be called "a cartel, an internation cartel, a patent pool, or a technical and commercial cooperation;" that it was in fact a combination and conspiracy in restraint of trade; that the restraint was unreasonable; and as such it violated Section 1 of the Sherman Act.

This decision appears to be the only one which appears to try to provide a definition. But it fails to do this.

The more recent Supreme Court decision, and dissents, in the Filling Station Case, *United States* v. *Standard Oil of California*, handed down on June 13 last, appears to provide a still more confusing example of the uncertainty of what a cartel is and what it is not.

Mr. Justice William O. Douglas in his dissent appears to fear that the majority decision would "help remake America in the image of the cartels", by forbidding the oil companies and the filling stations to enter into agreements which restrained competition. As those agreements obviously constituted cartel alliances, and that what the Justice appears to fear is the outright ownership of the filling stations by the oil companies, constituting single monopolies, it becomes extremely doubtful just how Justice Douglas might define either cartel or combine.

I think that I shall have to be content with my own comprehensive definition of cartel as a "restrictive alliance of competitive industry". (See 5 *Encyclopedia Americana* 638) until the Bench and the Bar does better than it has thus far.

HOWARD WATSON AMBRUSTER
Westfield, New Jersey

Plan for Avoiding Statism

■ Past President Frank E. Holman, in his valedictory to the American Bar Association at the opening of the 72d Annual Meeting, speaking on the subject, "Must America Succumb to Statism", makes two points:

1. Two wars were fought to vindicate the "American way of life", but the issue of statism persists.

2. In the name of "social justice", "economic equality" or "racial equality" basic rights guaranteed by our republican form of government have been lost and statism has flourished.

Concededly, the trend in our National Government is more and more in the direction of statism.

That despite the mass bloodshed of two catastrophic wars, each one more devastating than the last, we are drifting more and more in the direction of governmental control of the individual is but added proof, if proof be needed, that legalized killings on a mass scale, offer no solution to political problems. On the contrary, organized violence quite frequently accomplishes the very end we had sought to avert.

It is ironic that after fighting and crushing militarism in Japan and Germany we turned about and adopted the worst features of militarism in America. This is evident in a number of reports that were recently issued, chief of which is the one submitted by the Commission for the Reorganization of the Executive Branch of Government, headed by former President Herbert Hoover. This report asserted that national policy does not now come from the civilian heads of government. Instead, "the military have picked up the ball of national policy and are running down the field with it". In that state of affairs Congress is "practically helpless".

Similarly, in combating communism, a form of statism, we are accepting one by one all of the characteristics of communism. The drift toward statism in the last few years does not begin with plans for federal housing or federal aid to education nor socialized medicine, nor unless halted, will it end there.

With the passage of the Selective Service Act of 1948, which compels young men in a given age group to place not only their bodies but their minds and their consciences at the disposal of the state, statism was given great impetus. Compulsory acceptance of training in cold-blooded, premeditated killing is a complete repudiation of individualism and produces the kind of regimentation on which statism can thrive.

When the Federal Government, without constitutional authority and without protest from influential bar associations, was permitted to substitute federal spending for spending by individuals, and to use taxpayers' moneys to support corrupt, fascist regimes in China, Greece, Turkey; to underwrite the socialist government in England; to aid the Communist government in Yugoslavia; to condone imperialistic excursions of the Dutch and the French, statism became entrenched.

The Truman Doctrine, the Marshall Plan, Loans to Britain, Arms Aid Program, all are alike unconstitutional. Article I, Section 8 reads:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States....

Congress is not given the power to collect taxes and pour the money down foreign sewers; and as the Tenth Amendment reads:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Such power is not implied.

When the loyalty test oath laws were passed they pointed up the breakdown of democratic processes. In effect, a law that requires each public official to proclaim his loyalty to this government, and to assert that he is not subversive or connected with a subversive organization, substitutes conformity through coercion and fear for faith in individual

freedom of thought and expression, and allows the Government to brand as subversive every organization working for peaceable social change.

What can we do now to change the disquieting trend of our government?

1. We must recognize that certain economic laws are inexorable and immutable; that when money is spent for one purpose it is not available for another; that when the social wealth of a nation is drained from its taxpayers and used for heavy military expenditures and for flushing foreign sewers, these taxpayers cannot pay for homes, education and health, themselves. They are driven to turn to the State, the cause of their financial woes, for yet more statism. Thus, one act of statism begets others.

2. We should reduce taxes and return to the people the right to spend their own money as they see fit. This will call for a reduction in the number of governmental employees, who should be returned to private industry. With the saving in taxes, industry will become the employer instead of the state.

3. We should hold fast to democratic processes and constitutional authority. Enlargement of constitutional powers should be through constitutional amendment and not by ignoring constitutional limitations. Laws which tend to repudiate democratic processes should be repealed.

4. Unemployment should be solved by reducing the work week and by a public works program, rather than by expanding the production and distribution of armaments.

Supporting statism in one direction while decrying it in another may be in keeping with our present foreign policy, which expends money in one part of Europe to stem communism while simultaneously giving away money to support communism in another part, Yugoslavia. The end result is confusion and increased statism.

If democracy is annihilated it will not be because of attack from without by communists but because of internal disintegration through the Trojan horse of thought control, regimentation, burdensome taxes and other attributes of statism. So long as these continue the answer to Mr. Holman's question is: "Yes, America Will Succumb to Statism".

ESTHER STRUM FRANKEL
Paterson, New Jersey

Change Method of Choosing Federal Judges?

■ It is believed a great majority of the American Bar favors a change in the method of selection of federal judges. My suggestion is that the United States be divided into nine districts, consisting of not less than five or more than six contiguous states. Each district would select one Supreme Court Justice, selection to be made by a federal judicial council, composed of members representing all of the states in the district.

Members of the judicial council would be selected by the states. Method of selection might be left to the states, but the writer favors allowing each state three members, one to be appointed by the governor, one to be named by the legislature, and one to be named by the highest appellate court of the state.

Members of the judicial council would be selected for long terms (expiring at staggered dates), and would not hold any other state or federal office. Provision could also be made for the members of the Judicial Council of the areas affected to select the judges of all inferior courts, and select special judges of the United States Supreme Court in event of disqualification of the regular judges.

It is believed the above plan would result in selection of a balanced Court which would be truly national in character, comprising judges of outstanding legal ability, and reducing to a minimum the element of bias on any political, social, economic, or sectional question which might arise. It is not too much to hope that this system would enhance the chance of promotion of deserving state and federal judges. The danger of a wholesale overturning of precedents following the election of a new President would disappear.

The geographical distribution would assure a balance among the members of the Court in many respects which the Court has never had in all its history. With all sections represented the Court would have a much better understanding of the laws of the forty-eight states, and their relation to federal laws.

It is submitted that it is illogical for court appointments to be made by the head of the Executive Department of the Federal Government, at a time of centralization in government, and when many of the decisions of the federal courts involve the powers and acts of the Executive Department of the Government, and is incompatible with the idea of an independent judiciary as an equal branch of the Government.

It is obvious the President does not have time to give proper consideration to judicial appointments, and too often judicial appointees are better politicians than judges. When all appointments are made by one individual, too many of the appointees are likely to be found possessed of the same weaknesses and the same prejudices.

Current discussion of the United States Supreme Court indicates a better method of selection of judges must be found.

An application of the Missouri Nonpartisan Plan for selection of federal judges would be a distinct improvement over the present method of selection.

THOMAS A. HARTLEY
Kansas City, Missouri

1950 ANNUAL MEETING

WASHINGTON, D.C., SEPTEMBER 18-22, 1950

The Seventy-Third Annual Meeting of the American Bar Association and the Thirty-Second Annual Meeting of The Canadian Bar Association will be held in Washington, D. C., September 18 to 22, 1950. Further information with respect to the meetings will be published in the JOURNAL, from time to time.

The Canadian Bar Association has accepted the invitation of this Association to join with us in the 1950 Annual Meeting. Applications for hotel reservations and attendance at the meeting will, therefore, be limited to members of this Association and their guests, in order to assure adequate accommodations for our members and for the members of The Canadian Bar Association.

In requesting reservations, please note the necessity of remitting the registration fee and of furnishing information as to your preference in hotels (first, second and third choice), definite arrival date and whether such arrival will be during the day or evening, and probable date of departure.

HOTEL RESERVATIONS

JOINT HEADQUARTERS — HOTELS MAYFLOWER AND STATLER

(Because of shortage of rooms for single occupancy, please arrange to share double room with another, whenever possible.)

Hotel	*For Two Persons*			*Parlor, Bedroom and Bath*
	For one person	*Double-Bed*	*Twin-Beds*	
AMBASSADOR *(14th and K Sts., N.W.)*	$3.50-$ 6.00	$6.00-$ 8.00	$ 7.00-$ 9.00	
ANNAPOLIS *(12th and H Sts., N.W.)*	5.00- 6.00	7.00- 8.50	7.00- 8.50	
BLACKSTONE *(1016 17th St., N.W.)*	4.00- 5.00	6.00- 7.00	6.00- 7.00	
BURLINGTON *(1120 Vermont Ave., N.W.)*	4.00- 7.00	6.00- 9.00	7.00- 12.00	
CARLTON *(16th and K Sts., N.W.)*	6.00- 9.00		9.00- 12.00	
HAMILTON *(14th and K Sts., N.W.)*	4.00- 5.50	6.00- 7.00	7.00- 8.00	
HAY-ADAMS HOUSE *(16th and H Sts., N.W.)*	4.50- 7.00	6.50- 8.00	8.00- 9.50	
LAFAYETTE *(16th and I Sts., N.W.)*	4.00- 7.00	6.00- 9.00	8.00- 11.00	
MAYFLOWER *(Conn. Ave. and DeSales St.)*	5.00- 13.00	9.00- 9.50	10.50- 18.00	$18.00-$30.00
NEW COLONIAL *(15th and M Sts., N.W.)*	3.00- 5.00	5.00- 9.00	5.00- 9.00	
RALEIGH *(12th and Penn. Ave., N.W.)*	4.50- 7.50	6.50- 11.00	8.00- 12.00	
ROGER SMITH *(18th and Penn. Ave., N.W.)*	4.00- 7.00	6.00- 9.00	6.50- 9.50	
SHERATON *(15th and L Sts., N.W.)*	4.85- 5.85	6.35	7.85- 8.85	
SHOREHAM *(2500 Calvert St., N.W.)*	6.00- 8.00		9.00- 11.00	15.00- 35.00
STATLER *(16th and K Sts., N.W.)*	5.50- 11.50	8.00- 12.00	9.50- 14.50	
TWENTY-FOUR HUNDRED *(2400 16th St., N.W.)*		8.00- 10.00	8.00- 10.00	13.00- 15.00
WARDMAN PARK *(2600 Woodley Rd., N.W.)*	5.00- 8.00	8.00- 11.00	8.00- 12.00	15.00- 20.00
WASHINGTON *(15th and Penn. Ave., N.W.)*	5.00- 8.00	9.00- 12.00	9.00- 12.00	20.00
WILLARD *(14th and Penn. Ave., N.W.)*	4.50- 8.00	7.00- 11.00	8.00- 12.00	17.00- 30.00

EXPLANATION OF TYPE OF ROOMS

A single room contains either a single or double bed, to be occupied by ONE person. A double room contains a double (one) bed, to be occupied by TWO persons. A twin-bed room will NOT be assigned for occupancy by one person. A parlor suite consists of sitting-room and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the sitting-room.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating HOTEL (FIRST, SECOND AND THIRD CHOICE); number and type of room or rooms required; names and addresses of all persons who will occupy same; definite arrival date and whether such arrival will be during the day or evening; and probable date of departure.

As it is not possible to designate definite rates with respect to hotel accommodations, please indicate approximate rate desired, and we will endeavor to comply with your request, if possible.

Members who expect to arrive on early morning trains can avoid inconvenience of waiting for rooms by having reservations made for preceding evening and by paying for one additional day. Rooms reserved for morning arrival cannot be made available before midafternoon, unless voluntarily vacated by last occupant.

REGISTRATION FEE

REQUESTS FOR RESERVATIONS FOR HOTEL ACCOMMODATIONS MUST BE ACCOMPANIED BY PAYMENT OF THE REGISTRATION FEE IN THE AMOUNT OF $5.00 FOR EACH MEMBER. The Board of Governors solicits the cooperation of the members of the Association in thus facilitating the handling of the registration fee and in partially defraying the increasing expense of the Annual Meeting. In the event that it becomes necessary to cancel a hotel reservation, the registration fee will be refunded, PROVIDED NOTICE OF CANCELLATION IS RECEIVED AT CHICAGO HEADQUARTERS NOT LATER THAN AUGUST 28, 1950.

REQUESTS FOR RESERVATIONS, TOGETHER WITH $5.00 REGISTRATION FEE FOR EACH MEMBER FOR WHOM RESERVATION IS REQUESTED, SHOULD BE ADDRESSED TO THE RESERVATION DEPARTMENT, AMERICAN BAR ASSOCIATION, 1140 North Dearborn St., Chicago 10, Ill.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman, Harry K. Mansfield, Vice Chairman.

Family Partnerships and Controlled Corporations: Two Recent Cases

■ The Tax Court has struck a new note—or indicated a new emphasis—in its treatment of the family partnership problem. The case is *H. V. Funai*, 13 T. C. —, No. 90. The taxpayer and his wife Viola operated a poultry and grocery store. They filed partnership returns for 1940 and subsequent years, dividing the income equally. Neither had contributed any capital, the business apparently being financed out of earnings. Viola ran the grocery department and the court found that her services "were vital to the business enterprise."

Before the *Culbertson* case, 337 U. S. 733 (1949), this factor—the performance of vital services by the wife—probably would have been sufficient to warrant a decision favorable to the taxpayer. But now the focus is upon the intent of the parties—whether they "really intended to carry on business as partners". The question is to be decided in the light of all the circumstances, the performance of vital services being only one.

In the *Funai* case the Tax Court seized upon one factor and found it determinative of the question of intent. This was the absence of any showing that Viola, the wife, ever "exercised that most important privilege and that normal function of a partner—the receipt and control for her own use and benefit of any of the partnership profits". The actual disposition of the income is not clear from the report. Apparently much of it was invested by the husband. Some was deposited in a joint bank account or an account upon which the wife could draw. There were other factors in the case which might have affected the result. The significant thing however is the emphasis given to the receipt and control of income by the wife. To what extent is it necessary that a secondary partner actually draw down income and spend or invest it or deposit it in a separate account? Will the court recognize a family partnership if all the profits are left in the business under the practical control of the managing partner? The case may have important repercussions in this troubled area.

The same general question—to whom is the income taxable?—was involved in *Hugh B. Monjar*, 13 T. C. —, No. 77. The case concerned a corporation known as Golden Braid. Substantially all of its stock was owned by its two principal officers who were the sister and secretary respectively of the taxpayer Monjar. The court found that the corporation was dominated and controlled by Monjar. It accordingly sustained the commissioner in taxing to Monjar all dividends and the excessive portion of all salaries paid to the two officer-shareholders. There was no evidence that any part of this money had found its way into the taxpayer's pocket. The two women received the dividends and salaries and reported them for income tax. The conclusion that these payments should be taxed to Monjar, who was neither a shareholder nor an officer, is based upon a finding that "it was his choice that they received the money from Golden Braid".

Three judges dissented pointing out that the Commissioner had recognized and taxed the corporation as a separate entity, not treating it as a mere alter ego of Monjar.

The case represents an extension of the *Clifford* doctrine (applicable to trusts) and the family partnership rules. But Monjar's relation to this corporation and its function in his money-making activities were unique, and it is unlikely that the rule of this case will be applied in other more normal situations.

Tax Saving—How Far Can a Taxpayer Go?

Every taxpayer has the right to minimize his taxes by any legal means. So says the Tax Court in *Conrad N. Hilton*, 13 T. C. —, No. 78. The taxpayer was the holder of a $175,000 note. His basis or cost was only 30 per cent of the face amount of the note, or $52,500. If the taxpayer had received payments on the note from the maker 70 per cent of each payment would have been ordinary income and fully taxable. With this in mind he arranged with a bank to buy the note from him for $175,000. This was in order that the transaction might qualify for capital gain treatment under Section 117, as a "sale or exchange" of a capital asset.

The application of Section 117, according to the court, depended upon whether there was a bona fide sale, as distinguished from a payment, of the note—this despite the fact that the form of the transaction was dictated by a tax saving motive.

The determination of this question—whether there was a bona fide sale—was complicated by the fact that the maker was a corporation owned and controlled by the taxpayer and that this corporation by prearrangement had paid the bank $75,000 on the note a few days after the sale.

The court held that the transaction constituted a payment to the extent of this $75,000 and a sale as to the balance of $100,000 paid by the bank.

The partial recognition of this sale, despite its tax saving purpose, may help to keep the "business purpose" test within proper bounds. Taxpayers are not yet required to shape their transactions in the form that will produce the most taxes.

Contrast the tax saving scheme of another taxpayer, a scheme which backfired most seriously. This taxpayer was indicted for tax evasion, found guilty and sentenced to imprisonment. *United States* v. *Raub*, C. A. 7th, P-H, Par. 72,639. The defendant was a dealer in trucks. He purported to sell a number of trucks to one *R*, an employee, at cost. *R* thereupon sold the trucks to customers at OPA prices and realized an apparent profit of some $17,000. *R* used the proceeds to purchase two farms at a cost of $32,000. *R* then purported to sell the farms to the taxpayer for $14,000 realizing an apparent loss of $18,000, offsetting the profit on the trucks. There was evidence that the taxpayer had conducted the negotiations for the sale of the trucks by *R* and for the purchase of the farms.

Taken at face value this series of transactions would result in no taxable gain. The taxpayer merely sold the trucks at cost and acquired the farms at a bargain price of $14,000. No tax would be payable until he sold the farms.

The taxpayer frankly admitted that the purpose behind these maneuvers was tax avoidance or deferment. This admission was not fatal. Every taxpayer has the right, says the Seventh Circuit, "to decrease the amount of what would otherwise be his taxes, or altogether to avoid them by means which the law permits." The issue however was whether the entire scheme was a sham. As to this, while reversing the conviction for error in the charge, the court of appeals found the evidence sufficient to sustain the verdict.

The moral of these two cases is this. A taxpayer may properly set out deliberately to reduce his taxes. He may even be successful if the method selected has substance and reality and affects his legal rights. On the other hand if the method adopted is a subterfuge and lacking in reality he will save no taxes and, if the facts are not fully disclosed, he may be charged with fraud or even prosecuted for tax evasion.

OUR YOUNGER LAWYERS

Richard H. Keatinge, Secretary and Editor-in-Charge, Los Angeles, California

Activities for 1950

■ The new national officers of the Junior Bar Conference took office on January 1, 1950, and a very active program is already underway under the leadership of W. Carloss Morris, Jr., of Houston, Texas, incoming National Chairman.

Chairman Morris is anxious to enlist every member of the Junior Bar Conference in active work in one or more of the Conference committees. In order that Conference members may be more fully aware of the scope of the activities of the various committees of the Conference, there appears below a brief description of the work which each committee is presently undertaking, together with the name and address of each national committee chairman. Conference members interested in the work of a particular committee are urged to write directly to the appropriate committee chairman.

Activities—Chairman, Paul Lashly, 705 Olive Street, St. Louis 1, Missouri. The principal work of this committee includes preparation of new programs and plans for Conference activities, making recommendations as to which committees should be discontinued, and as to the way other committees of the Conference should change the scope of their activities.

Annual Meeting—Chairman, John P. Moore, 1317 F Street, N.W., Washington, D. C. The Annual Meeting Committee is responsible for arrangements and preparation of programs for the next Annual Meeting of the Junior Bar Conference to be held in Washington, D. C., during September, 1950.

Awards of Merit—Chairman, Clarence A. Guittard, 711 Interurban Building, Dallas, Texas. Each year awards of merit in the form of certificates are presented to state and local Junior Bar groups affiliated with the Conference for excellence in Bar activities. This committee is responsible for evaluating the work of these groups and making the presentations to the winning groups.

By-Laws – Chairman, Thomas Cooch, Delaware Trust Building, Wilmington 28, Delaware. The By-Laws Committee is responsible for clarifying and improving the by-laws of the Conference in order that they may fully and clearly express the purpose and nature of Conference activities.

Coöperation with Junior Bar Groups—Chairman, Elizabeth Carp, 1616 Forest Avenue, Dallas 15, Texas. Members of this committee keep in close touch with affiliated junior bar organizations throughout the country and make efforts to secure the affiliation with the Conference of additional state and local young lawyer groups.

Inter-American Bar—Chairman,

William A. Gillen, Citizens Building, Tampa 2, Florida. The Committee on Inter-American Bar was last year responsible for establishing a Committee on Activities of Younger Lawyers in Inter-American Bar Association. Work of this JBC committee during 1950 will be directed toward furthering the close relationship presently existing between the American Bar Association and the Inter-American Bar Association.

Justice of the Peace and Similar Courts—Chairman, John W. Stewart, 1412 Sharp Building, Lincoln, Nebraska. The work of this committee is primarily connected with raising the standards of trial courts of limited jurisdiction throughout the United States.

Legal Aid — Chairman, Stanley Brown, 140 Stark Street, Manchester, New Hamphire. The Legal Aid Committee, working in coöperation with the Standing Committee on Legal Aid Work of the American Bar Association, is engaged in attempting to extend the work of Legal Aid Clinics to areas where such clinics do not exist. The committee is also engaged in studying the advisability of expansion of a system of voluntary and public defenders throughout the country.

Legislative Drafting — Chairman, Frederick Hall, First National Bank Building, Dodge City, Kansas. The Legislative Drafting Committee is engaged in studying the methods utilized by various state legislative drafting bureaus and in establishing such bureaus in states where they do not presently exist.

Membership—Chairman, Robert H. Hosick, 301 Henrietta Street, Kalamazoo, Michigan. The Membership Committee, as its name implies, is interested in increasing American Bar Association membership, particularly among younger lawyers.

Procedural Reform — Chairman, Rosemary Scott, 308 Federal Building, Grand Rapids, Michigan. The Committee on Procedural Reform is assisting Chief Justice Vanderbilt of New Jersey in completing and checking surveys recently conducted in this field.

Public Information — Chairman, Lewis Donelson, Commerce Title Building, Memphis 3, Tennessee. The principal work of this rapidly expanding committee during the past several months has been the conduct of "Americanism Month" sponsored by the Junior Bar Conference during the period between Thanksgiving and Christmas of 1949. The committee expects to continue its activities during the present year in the production and distribution of scripts on the American form of government and in encouraging the participation of lawyers on radio programs throughout the nation to explain the position and activities of the lawyer in the community.

Relations with Law Students—Chairman, Charles Joiner, University of Michigan Law School, Ann Arbor, Michigan. This very important committee was responsible for the organization of the American Law Student Association at St. Louis last September. Work during the present year will be concerned primarily with increasing the number of law schools participating in work of the Law Student Association and increasing membership in schools already affiliated.

Small Loan Studies—Chairman, Joseph A. Madey, 309 Center Street, Little Rock, Arkansas. This committee is interested in encouraging the making of surveys regarding the status of small loan activities in states where such surveys have not yet been undertaken.

Survey—Chairman, Cameron Cecil, 458 South Spring Street, Los Angeles 13, California. This important committee is now conducting a survey of the economic condition of younger lawyers throughout the U. S.

Unauthorized Practice—Chairman, John A. Morrison, Seventeenth Floor, Bryant Building, Kansas City, Missouri. The Committee on Unauthorized Practice is continuing in its endeavors, in coöperation with the senior Bar, to stamp out instances of unauthorized practice and is studying the Administrative Practitioners Act now under consideration by the U. S. Congress.

W. CARLOSS MORRIS Bob Bailey

The Young Lawyer—Editor, Walter P. Armstrong, Jr., Commerce Title Building, Memphis, Tennessee. *The Young Lawyer* reports the news of the Junior Bar Conference and has been extremely successful in furthering the program of the Conference.

Chairman Morris strongly urges every member of the Conference who is interested in the work of a particular committee to communicate with the chairman of such committee. Members of state and local junior bar groups affiliated with the Junior Bar Conference are likewise invited to participate in the work of the Conference. In addition, Harry Clifford, 1108 Colcord Building, Oklahoma City, Oklahoma, Vice Chairman of the Committee on Coöperation with Junior Bar Groups, will be happy to assist in the affiliation with the Conference of presently unaffiliated junior bar organizations. Chairman Morris also invites any member of the Conference or affiliated groups to write directly to him at 1302 Rusk Building, Houston, Texas, to National Vice Chairman, Charles Burton, National Press Building, Washington 4, D. C., or to National Secretary, Richard H. Keatinge, 510 South Spring Street, Los Angeles 13, California, with respect to plans for closer coöperation with affiliated groups and to make appropriate suggestions for initiating worthwhile projects which should be undertaken by the Conference.

BAR ACTIVITIES

Paul B. DeWitt · Editor-in-Charge

Carl H. SMITH

■ Carl H. Smith of Bay City was elected President of the State Bar Association of Michigan at its annual meeting in September. Over thirteen hundred members attended the three-day meeting held in Detroit.

Governor G. Mennen Williams opened the sessions. Other speakers were President Harold J. Gallagher, William A. Sutherland, Ralph M. Hoyt, Francis X. Busch and Carl B. Rix. An interesting feature of the meeting was an exhibit of law books, business machines and office furniture.

Alfred W. Hewitt of Grand Rapids was appointed the new chairman of the Junior Bar Section. A graduate of the University of Michigan Law School, Mr. Hewitt served as a captain in World War II and has been active in local civic affairs. The Junior Bar Section won the Honorary Mention Award this year from the Junior Bar Conference of the American Bar Association.

■ The Baton Rouge Bar Association has recently inaugurated a plan for group life insurance and group accident and sickness insurance for its members. Group accident and sickness insurance is no novelty, as many bar associations have similar plans in operation but few have group life insurance for their members.

The coverage on the group life policy is five thousand dollars for the lawyer and two thousand dollars for his employee, with double indemnity before the age of sixty-five and waiver of premium in the event of total disability before the age of sixty. The premium is calculated on the average age for the group per thousand of insurance, and in the case of the Baton Rouge Bar Association the initial premium was slightly over twelve dollars per thousand per year. The lawyer must bring in, and himself pay for, all his full-time employees but only for two thousand dollars insurance. The conversion provisions are standard.

The plan has proved very popular with members of the Baton Rouge Association. Some ninety out of ninety-eight eligible lawyers are participating in the plan. The President of the Baton Rouge Bar Association is Ben R. Miller, Triad Building.

■ The Committee on Continuing Legal Education of the American Law Institute, collaborating with the American Bar Association, reports a number of activities during the past two months.

The literature of the Committee is being sold on a subscription basis, entitling subscribers, for an annual rate of ten dollars to receive six publications which sell separately at two dollars each. The details of the subscription plan are being currently advertised in the AMERICAN BAR ASSOCIATION JOURNAL and in numerous state and local publications. Included in Series One of the plan are:

Legal Problems in Tax Returns, by Thomas P. Glassmoyer and Sherwin T. McDowell

Lifetime and Testamentary Estate Planning, by Harrison Tweed and William Parsons

The Drafting of Partnership Agreements, by John E. Mulder and Marlin M. Volz

Labor Law and Labor Negotiations, by Marcus Manoff

Basic Accounting for Lawyers, by Barton E. Ferst

Price and Service Discriminations under the Robinson-Patman Act, by Cyrus Austin and S. C. Oppenheim

The first three mentioned booklets are available for immediate delivery to subscribers and purchasers, while the remaining three will be published early in 1950. Further details can be secured from the Director, Committee on Continuing Legal Education, 133 South 36th Street, Philadelphia 4, Pennsylvania.

Pamphlets on the following subjects are planned for future publication:

Wage and Hour Problems
Organizational Problems of Small Businesses
Procedure before the Bureau of Internal Revenue
Bankruptcy and Arrangement Proceedings
Pre-Trial Procedure under the Federal Rules
The Drafting of Corporate Instruments

Institutes were held during October and November as follows:

Colorado Bar Association (Annual Meeting), Colorado Springs, October 15, 1949: Legal Problems of Small Businesses; Speakers: Richard Tull, Denver; Thomas M. Burgess, Colorado Springs; Allin H. Pierce, Chicago; approximate attendance, 400.

West Virginia State Bar (Annual Meeting), Huntington, October 14, 1949; Legal Problems of Small Businesses; Speakers: Leonard Sarner, Albert W. Gilmer and Joseph W. Price III, all of Philadelphia; approximate attendance, 125.

Lancaster, Pennsylvania (Lancaster County Bar Association), October 21, 1949; Legal Problems of Small Businesses; Speakers: George Craven, Albert W. Gilmer and Fred

L. Rosenbloom, all of Philadelphia; approximate attendance, 50.

Oklahoma State Bar Association (Annual Meeting), Oklahoma City, November 16, 1949; Legal Problems of Small Businesses; Speakers: Cleo Cund, Duncan, Oklahoma; Dean Earl Sneed and Professor Dale Uliet, University of Oklahoma Law School; and Allin H. Pierce, Chicago.

Harrison Tweed, President of the American Law Institute, addressed 250 members of the District of Columbia Bar Association on October 11, 1949, on the subject of The Drafting of Wills and Trust Instruments.

Programs planned for the near future include:

Philadelphia Bar Association, fifteen lectures on Problems of General Practice: Real Estate Transactions (five lectures), Family Law (three lectures), Practice and Procedure under the Federal Rules of Civil Procedure (four lectures), and Legal Problems in Tax Returns (three lectures).

Georgia Bar Association, Atlanta, December 8 and 9, 1949 (mid-winter meeting), Estate Planning for Smaller Estates (three lectures); Speakers: Professor A. J. Casner, Harvard Law School, Allan H. W. Higgins, Boston, and William Parsons, New York City; Legal Problems of Small Businesses (three lectures); Speakers: Chester Rohrlich, New York City, Arch Cantrall, Clarksburg, West Virginia, and George Craven, Philadelphia; The Trial of a Negligence Action (Dramatized Recording).

St. Louis (Missouri) Bar Association, ten lectures on Current Problems in Tax Returns: Tax Returns (two lectures), Estate and Gift Tax Problems (two lectures), and Tax Problems in Business Transactions (six lectures).

Lancaster (Pennsylvania) County Bar Association, Legal Problems in Tax Returns (three lectures) and Estate Planning (three lectures).

Jacksonville (Florida) County Bar Association, December 16, 1949; Legal Problems of Small Businesses; Speakers: Leonard Sarner, James M. Sutton and Joseph W. Price III, all of Philadelphia.

Mecklenberg County Bar Association, Charlotte, North Carolina; Bankruptcy and Arrangement Proceedings.

Nebraska State Bar, Omaha and North Platte, February 17 and 18, 1950; Problems of Legal Draftmanship (three lectures), including the Drafting of Wills and Trust Instruments, the Drafting of Partnership Agreements, and the Drafting of Corporate Instruments.

Earl J. MOYER

■ The fiftieth annual meeting of the Nebraska State Bar Association was held in Omaha in October. In observance of the occasion all members of the Bar admitted for fifty years or more were honored guests at the annual dinner held on the evening of the first day of the meeting.

Harold J. Gallagher, President of the American Bar Association, spoke at the association luncheon on Thursday. Dean Roscoe Pound who was the first secretary of the Nebraska State Bar Association was principal speaker at the dinner held on Thursday evening.

Section meetings were held on Thursday afternoon and Friday morning. A speech by Senator Edward Martin of Pennsylvania opened the Friday afternoon session. The balance of the afternoon was devoted to a pretrial demonstration by Judge Alfred P. Murrah of Oklahoma City. At the demonstration Judge John W. Delehant, United States District Judge, of Lincoln, acted as moderator. Robert Van Pelt and George Healey, both of Lincoln, were the participating attorneys. The pretrial demonstration drew the largest attendance of any session of the convention.

Officers elected were Earl J. Moyer of Madison, President; Leon Samuelson of Franklin, Thomas M. Davies of Lincoln and John L. Barton of Omaha, Vice Presidents; and Joseph C. Tye of Kearney, Member at Large of the Executive Council.

■ Yale Law School was declared the winner of the moot court competition sponsored by the Junior Bar Activities Committee of The Association of the Bar of the City of New York. Alfred P. O'Hara is chairman of this committee. The competition, held on December 1 and 2, brought students from seventeen law schools to argue a case involving constitutional questions raised by a confession obtained from the defendant while he was allegedly detained illegally by the police.

The students argued on an elimination basis in four rounds of arguments covering two days. The final round was argued before a bench presided over by Supreme Court Justice Felix Frankfurter. Other members of the final bench were former Secretary of War Robert P. Patterson, John W. Davis, former Democratic candidate for President, Judge Samuel Seabury, and Harrison Tweed, president of the American Law Institute.

Schools participating in the competition were Yale, University of Michigan, University of Chicago, Pennsylvania, Cornell, Fordham, Temple University, Columbia, Catholic University, Northeastern, New York University, University of Virginia, University of Buffalo, St. John's, Albany Law School, Brooklyn Law School, and Boston College. Each school was represented by a team of three students. The winners from Yale Law School were awarded the Samuel Seabury prize, a sterling silver Revere bowl.

LONDON LETTER

H. A. C. Sturgess • Librarian and Keeper of the Records, Middle Temple

Solicitors War Memorial

■ On July 8, 1949, in the Law Society's Hall, the Archbishop of Canterbury dedicated the Memorial to solicitors who lost their lives in the war. The Memorial, as stated in the Law Society's *Gazette;* was designed by Mr. Gilbert Bayes, who took for his inspiration Athene Polias, the goddess of counsel and war and protectress of cities. In its conception and execution it is one of the most beautiful and impressive works the writer has seen, and a fitting tribute to the 314 solicitors and 223 articled clerks who made the great sacrifice.

Before unveiling the Memorial the President of the Society, Sir Alan Gillett, said:

> In the history of our Nation we have travelled into periods of great peril from which we have experienced great deliverance. Such is the case in regard to the war just passed. We attribute our freedom here to-day to the power and mercy of God. It has, however, been accomplished by the sacrifices made for us by those we hold most dear. We have enshrined what they did for us in our hearts, where their remembrance will ever in our love abide; this is our own private and personal remembrance for them. It is, however, most fit and proper and, indeed, a sacred duty, that each section of the community and more especially a great profession such as ours should express its own appropriate memorial of remembrance to those who did not hesitate to give their all for that profession and their country. As one of our great poets has said, this is a "sad occasion dear", but we welcome it as our opportunity of coming together to express publicly on behalf of our profession the deep respect, gratitude and honour due to those whose memory we revere and our deep sympathy with their relatives.

Sir Alan then unveiled the central figure and invited the Archbishop of Canterbury to dedicate the Memorial. After the dedication the Last Post and Reveille were sounded.

In the course of his address the Archbishop said that those to whom the memorial was raised saw

> that not only our freedom but all freedoms were imperilled; and one of its essential pillars, the rule of law among men, in danger of being overthrown. Liberty has its law without which it cannot be preserved. In the law, whose servants these men were, there is much which is relative to human needs, contingent upon circumstances, mutable, changing. But its principles of truth, justice and equity, transcend man's mutabilities—they are absolutes which find their source and their sanction not in man but in the Righteousness of God. For those absolutes, apart from which man is unanchored to any dignity and a prey to every lust and passion, every pride and tyranny which can deprave and defile men, for those absolutes they died. . . .
>
> In this memorial we commemorate not only the great hour of our Nation's trial or the great contributions of this and other professions; we commemorate men each of whom in his own essential being gave all that he had; and remembering the faithfulness and sacrifice of Christ, we commend them and ourselves and all human beings to the righteous and loving Hands of God, who is Lex, Lux, Dux, Rex—our Law, our Light, our Captain, and our King.

King and Queen at Temple Dinner

The Treasurers and Benchers of the Inner and Middle Temples met at a joint dinner in the Middle Temple Hall on July 20, 1949. Reference was made to this dinner, as a coming event, in the last "London Letter." It has now taken place, and the event is one more item added to the long history of the Inns of Court. It was the first occasion upon which a reigning monarch and his consort had attended together such a joint dinner, and was, therefore, regarded as a very special occasion. Their Majesties were received by the Deputy Treasurers of the two Inns, Lord Merriman (Inner Temple) and Sir Henry MacGeagh, K.C. (Middle Temple). The Benchers, having filed into the Hall, preceded by the macebearers of each Inn, remained standing while the King struck the table with the ceremonial gavel for silence. The Queen then said the grace which has been said regularly at dinner in the Middle Temple Hall for at least four centuries:

> The eyes of all things look up and put their trust in Thee, O Lord! Thou givest them their meat in due season; Thou openest Thine hand, and fillest with Thy blessings every living thing. Good Lord, bless us and these Thy good gifts which we receive, of Thy bounteous liberality, through Jesus Christ our Lord. Amen.

The dinner over, His Majesty again gave the knocks with the gavel and, all standing, the Queen said the closing grace:

> Glory, honour and praise be given to Thee, O Lord, Who dost feed us from our tender age, and givest sustenance to every living thing. Replenish our hearts with joy and gladness, that we, having sufficient, may be rich and plentiful in all good works, through Jesus Christ our Lord. God save his Church, the King, and all the Royal Family, and this Realm; God send us peace and truth in Christ our Lord. Amen.

The Queen then proposed the King's health, after which the King rose to propose the health of the Queen as Treasurer of the Middle Temple. The King then rose again to propose the toast of the Middle Temple and the Queen that of the Inner Temple. The two Royal Treasurers afterwards inspected the Charter granted by King James by which the land of the Temple was passed to the two Societies. The

iron-bound chest in which it was contained was opened, and their Majesties appended their signatures to a specially prepared document in the following terms:

> The Honourable Societies of the Inner Temple and the Middle Temple—Be it remembered that at a joint dinner of the Benchers of both Inns held in the Middle Temple Hall on the 20th July, 1949, this Chest was opened and the Charter inspected.

This document was also signed by the Deputy Treasurers.

Barristers' Benevolent Association

The report of the Barristers' Benevolent Association for 1948, has recently been issued, and it lists subscriptions amounting to £3,961:-10:10, and donations of £5,744:5:3, the latter sum including £3,118:15:0, received by way of legacies. Grants to the value of £10,253:1:3 were made during the year. The object of the Association is to afford assistance in necessitous and deserving cases to members of the English Bar, special pleaders and conveyancers, who are or have been in practice in England, their wives, widows and children, and, in exceptional circumstances, dependant relatives. The report notes that gradually but perceptibly an approach is being made to the realization of the grand conception which will secure to all a competence in sickness as in health and a pensioned aftermath stretching actuarially into extreme old age which financial freedom will ensure. Ultimately, no doubt, it is stated, barristers will come under the universal umbrella and the Association will be wound up. But not yet. The State is not yet the universal provider and the Report records that there has been a reduction of approximately £120 per annum in the Association's income through the nationalization of British Railways. The work of the Barristers' Benevolent Association is, of necessity, done in secret and it is claimed that "if the profession as a whole knew what blessed alleviation is carried in its name to the aged, the sick, the forgotten, the unfortunate" there would be no lack of funds even in these days.

"Books for Lawyers"

(Continued from page 39)

ists[1] have recorded their answers to such questions in this volume, which contains the lectures delivered at the First Natural Law Institute at the University of Notre Dame in December, 1947, by Clarence T. Manion, Dean of the College of Law; the Reverend William J. Doheny, C.S.C., of the College of Law; Mortimer Adler, Professor of the Philosophy of Law at the University of Chicago; Harold R. McKinnon, of the San Francisco Bar; and Ben W. Palmer, of the Minneapolis Bar. The lecture on "Eternal Law" is theological rather than jurisprudential, and will not be here discussed.

An old man and his wife once spent a great deal of time arguing over whether the sails of a windmill were turning east or west. Since one was looking at the top, the other at the bottom, both were right. Professor Adler demonstrates that much of the natural law dispute is this kind of argument. He seeks the common ground of the European philosophers who have accepted natural law, and finds it in the belief in principles of conduct discoverable by reason apart from convention or experience. "It consists in the affirmation that there exist moral and political truths which men can discover by their reason. These truths have the status of knowledge rather than mere opinion." And they are regarded "as the measure of right in all the laws of the state". Natural law, he says, is an unfortunate term. "No one would have misunderstood the distinction between a *right by nature* and a *right by political institution.*" When Hobbes denies that "natural law" is really law, he is logically correct, because his definition of law necessarily excludes "natural law".[2] Natural and positive law cannot be brought under one definition. ". . . the issue between the naturalists and the positivists can be more clearly put if the naturalists admit that natural law is not law in the same sense . . . as positive law." Then the naturalist need only demonstrate that rational principles lie beneath the positive rules. Let him not confuse the issue by his own ambiguous use of the word "law". This is excellent advice. If the naturalists will follow it, they can eliminate much of their opposition. For it is assertions of "what is not right reason is not law" and the like which cause lawyers to exclaim with Bentham, "nonsense—nonsense upon stilts." And the contenders for natural law would also do well to heed Adler's suggestion to carry on the discussion on the philosophical level entirely, not the theological.

Dean Manion, after finding judicial review to be the distinctive genius of American law, poses the question whether the limitations put upon government activity under this doctrine are ends in themselves defensible only as traditions, or the means to the protection of natural rights. In search of his answer, he examines the legal philosophy of the founding fathers and finds that it was based on conceptions of natural law expressed by Coke and Blackstone, that is: the law of nature as the will of God, discoverable by the use of right reason, and under which man has absolute rights. But the fathers, says Manion, went further, and actually put into effect Coke's famous dictum that an act of the legislature against common right or reason should be declared void by the courts.

Dean Manion's paper demonstrates well enough that the American revolutionists believed in a theistic

1. This term is used as a convenience, after the example of Professor Adler, to designate adherents to the natural law doctrine.

2. This reviewer made a clumsy attempt at pointing out this distinction in "Conscience and the Law", 35 A.B.A.J. 291; April, 1949.

natural law and divinely endowed rights and that they used this belief as reason and justification for their acts. Although this has probably never been doubted, it may well be worth restating. But before we accept the proposition that the natural law philosophy is of the essence of judicial review, we may be excused for wishing that some other questions had been discussed:

(a) Although the Constitution-makers undoubtedly intended to say that Federal Government should not violate certain human rights, was it their clear intent to invest the judiciary with the power to prevent such encroachment by voiding acts of the legislature?

(b) What did Thomas Jefferson, extensively quoted in Dean Manion's article, think of this?

(c) What did John Marshall have to do with establishing judicial supremacy, and what were his views on natural law?

(d) Should not a distinction be made between laws declared unconstitutional because they violate the first ten or fourteenth amendments and laws declared unconstitutional because they violate the principle of distribution of powers? What does natural law have to do with the judicial power to overrule in the latter case?

(e) As to judicial review for the protection of individual rights from the sovereign's encroachment, what of the fact that there was no such protection as against the states, where indeed individual rights were most vulnerable because of the residuary of police power, until the fourteenth amendment was adopted, long after the days of the founding fathers?

That a desire to permit each man to strive in his own way for perfection and happiness has been and is the spirit of American law, not many will deny. The question is, can we stop here, or must we go on with Dean Manion to assert that this spirit derives from revelations of divine will?

Ben W. Palmer learnedly traces the development of pragmatism in America under the leadership of James and Dewey. He discusses the doctrine of truth as relative rather than absolute, the prevalance of the scientific or inductive method and its extension into the social sciences, the divorcing of the social sciences from a moral basis, the departure of psychology from philosophical footings, the general decline of philosophy from any serious position in our educational system. This pragmatism he shows to have spread to and dominated our law schools, bringing with it the scientific, analytical and inductive method represented by the case system, and virtually excluding treatment of the philosophical and ethical foundations of the law. Natural law, having its basis in eternal verities, could not, of course, withstand this tide. It is the conclusion of Mr. Palmer that "law like life needs an integrating philosophy that will give some objective standards, some sure footing amidst the shifting sands of crumbling secular institutions."

Harold R. McKinnon finds our house of law to be divided in theory and practice over the question of natural law. "The practitioners go on . . . perpetuating the Anglo-American ideals of reasonableness and natural justice as the test of legislation and decision", but the philosophers have turned to analytical and historical jurisprudence. Natural law, he says, dominates the working of the law, despite the theorists, as witness the distinction between acts *mala in se* and *mala prohibita*, the constitutional guarantee of natural rights, the extension of due process to matters of substance, and the whole body of equity. Men naturally think in terms of natural law, says McKinnon, and so it has survived. The law must have values based on reason. The only alternative is to try to remake man without values, and of this we have seen the consequences.

The significance of this little book is not to be measured by our agreement with its conclusions. Americans have been rubbing their eyes ever since Hiroshima. Emotionally sure of the values of their culture, they are wondering about the reasons for their assurance. Thus we of the law are looking for universal principles in support of our system. And Dean Manion is perhaps correct in believing the great question to be: Can we maintain our protection of individual human dignity only as a tradition, valid only as a transient historical development; or can we maintain that protection as the upholding of eternal good against eternal evil?

MAX C. PETERSON
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Administrative Court

(Continued from page 16)

peals, the Court of Claims, and the Tax Court, but also of the courts of the District of Columbia. The District Court of Appeals, for example, has exclusive jurisdiction to review actions of the Federal Communications Commission in most matters relating to the licensing of radio stations. Over the years it has heard and decided many such cases on appeal. Its members are familiar with the radio technical jargon and, in arguing a case before it, it is unnecessary to take most of your time explaining frequencies, channels, kilocycles, millivolts-per-meter and the many other words that must be understood before a court can pass on the claims made by the parties, and before it can even determine who the necessary parties are. It is able also, as it must be in radio, to see a particular case in its proper setting in regard to radio communication as a whole. Although naturally the members of the Court have differed in character and ability, and the quality and soundness of its decisions have varied from time to time, as is true in all courts, I have noticed no tendency to favor either the Government (*i.e.*, the Commission) or private parties. And I am sure that persons subject to radio regulation,

the Commission itself and the public are better off for having had the benefit of this degree of specialization vested in this one Court.

The next advantage I shall mention is that of promoting uniformity, both in the substantive and the adjective law in the administrative process, including the umpiring of the jurisdictional clashes which so often occur between agencies. This is closely related to expertness. As I have already pointed out the creation of federal administrative agencies has injected a topsy-turvy feature into what was once a simple judicial pyramid. Take the orders of the Interstate Commerce Commission or any of the several other agencies whose decisions are subject to judicial review under the Urgent Deficiencies Act. The reviewing courts consist of statutory three-judge district courts all over the country. Take the orders of the Federal Trade Commission and a number of other tribunals (including the Tax Court) whose decisions are subject to judicial review by eleven Courts of Appeals scattered over the country. In our judicial system, the diversity of decision is at the base where 207 federal district court judges, usually conveniently located for the parties to controversies, decide cases in the first instance. As the cases progress upward on appeal, the field is narrowed through the eleven Courts of Appeals (who, in some cases, are short-circuited by resort directly to the Supreme Court) and at the top to the Supreme Court. In our present administrative system, however, one tribunal sits at the base. At the next or appellate level (in many classes of cases) we first arrive at diversity of tribunals and of decisions, either in the federal district courts or in the courts of appeals. This not only breeds uncertainty as to what the law is but sometimes throws a greater burden on the Supreme Court than can be justified by the importance of the questions involved. Also, I am not satisfied that the Supreme Court has contributed very much either to formulate or to solve the problems of the administrative process.

The total number of agency decisions reviewed by all the federal courts in any one year may seem impressive but, if you exclude tax and patent cases, the number handled by any one court (except the District of Columbia courts in certain classes of cases) is so tiny as not to permit either specialization or any material progress toward uniformity.

Another aspect of the uniformity problem is presented by the many different methods of obtaining judicial review now employed. I realize that this bill will not do away with any of them but, if it becomes law, it may demonstrate, and I believe it will, that a simple single direct method is better than the disconcerting variety we now have.

A third advantage is the relief which, it is hoped, will be afforded to our overburdened federal courts. Needless to say, I intend no criticism of these courts. I do not think it is helpful to discuss this advantage in terms of mere number of cases. It is more a question as to the bulk of each case, the size of the record, the technical terms that must be studied and understood, and the background knowledge which must somehow be obtained by the court of the operations and the regulatory field of the agency in question and of similar agencies. In large measure, the courts have denied themselves the power to review the determinations of those agencies almost entirely on issues of fact and to some extent on issues of law. Although the Constitution was usually invoked as the reason, I venture to say that a most important factor in this self-denial was a sense of inadequacy for such burdens and a reluctance so greatly to increase the judicial work load. This can be read between the lines in several Supreme Court decisions.

These three advantages, expertness through specialization, development toward uniformity, and relief of the federal courts seem to me amply to justify this comparatively mild and cautious experiment, or some equivalent measure. There will be additional cost, certainly, at least in the earlier years but it will be in terms of pennies at a time when we are spending billions and, I believe, the end result will be economy in the over-all cost of litigation arising out of the administrative process. The proposed new court is fitted neatly into our judicial pyramid so far as is permitted by the multitude of other administrative courts. Unlike some of the administrative court systems in Europe, *e.g.*, in France, it is inferior to and subject to review by the Supreme Court. I have not heard any very serious grounds for refraining from giving this experiment a fair chance to demonstrate itself.

In closing, I shall quote the closing sentence of Section 2 of the Bill:

> For all purposes the court shall be deemed an independent, specialized, and superior tribunal with respect to the subject matter and issues of fact or legislation before it, endowed with

primary jurisdiction and final authority, and created to assure protection of all persons, conformity with legislative policy, and uniformity in the interpretation and administration of law.

These are lofty objectives. I am sure that Senator McCarran, his colleagues and his coworkers, are honestly and ably devoting their efforts toward achieving them. I believe that the bill, or something reasonably equivalent to it, offers a reasonable prospect of substantial progress, and that it involves no substantial dangers or disadvantages. I hope that its essential features will be given hearty support by the American Bar.

Reform of Legal Education

(Continued from page 20)

but the student does not plead. He may have learned the rules of pleading, but he has not been required to apply them. Trial procedures, the examination and selection of the jury, the opening statement of counsel, the actual examination and cross examination of witnesses, the oral arguments of the lawyers and the competitive atmosphere of litigation with the human factors that are often so determinative of the outcome of the legal drama in which the lawyers are the important actors, receive scant attention in the education of the lawyer. He should not have to learn these fundamentals "the hard way". The law school practice court as presently conducted cannot supply these deficiencies. The time allotted does not permit every student actually to conduct a law suit or play the part of a lawyer in its entirety in a single case. Recent efforts to provide realism by some law schools are but admissions of the need for more realism. There are substantial reasons for practice courts, but the fact is they are not real practice courts and cannot become such without modifying our present approach to law school methods.

The inability of so many law students to express themselves either orally or by the written word is appalling. Those who are content with the *status quo* admit the truth of that statement, but say that the law school is too late for its correction. True, the professional school cannot provide courses in spelling, grammar and English composition, but it *can* recognize that the lawyer's preparation is incomplete without the ability to write and speak well, and the law school *can* do something to correct it. One learns to write by writing and to speak by speaking. Carelessness of expression should not be permitted to law students at any time. If required to draft legal instruments as a part of every course and held to accountability for errors of composition as well as for those of law, the result would undoubtedly be better composition. Especially would this be true if the student were given to understand on admission that his deficiencies in English would have to be corrected before graduation.

The lawyer who is prepared adequately to represent his client and discharge the trust he assumes must be able, when necessary, to speak in behalf of his client.

If the lawyer is to discharge his duty to society in the traditional leadership of his profession, he should be able to espouse his cause in the forum of public discussion. The inability of the law student in this field is more pronounced than his inability to write well; yet in the practice of law he is called upon to argue his client's cause before both court and jury. Where is the law school that requires its candidates for degrees to demonstrate even a modicum of ability in this respect, or undertakes to aid its students by instruction and practice in the art of public or court speaking? Observe the typical student of the law in the classroom. If required to rise when reciting he appears ill at ease, he grasps the chair or desk for physical support, his posture is that of the enfeebled, and, if challenged by contradiction, he becomes inarticulate and retires from verbal combat. There are exceptions of course, but the exceptions are in no way indebted to their law school training for their ability to speak well. It is often said that public speaking is the province of the college, and the student should have had this training before he comes to law school. Granted, but most have not had it and we admit them to law school without it, then do practically nothing about the deficiency. What should the law school do about it? Why, of course, the law school should undertake to correct it, and it has three years in which to do it if it would.

Lawyers Formerly Trained by Bar Itself

Why has this inadequacy of law school training come to prevail? Education for the Bar in England and America prior to the Revolution was largely the province of the guild of the professional practitioners of the Inns of Court. The practitioner and apprentice lived and ate together and shared a common experience in the practice. It was the responsibility of the Bar to train and replenish the guild, and from this system there came great names not only at the Bar but in social and economic advancement. There was emphasis on the arts of forensic disputation and the student learned both by observing and by taking part in the actual work of courts and lawyers. The period beginning with our war for independence and concluding with the Civil War witnessed the era of law apprenticeships in America. While the College of William and Mary granted its first law degree in 1793 and other American colleges and universities began to offer courses

in law, the majority of American lawyers received their education in the offices of practicing lawyers. There they learned by doing under their preceptor and their training largely depended upon the preceptor's zeal and ability. This system had one educational essential that the modern law school has lost. The apprentice in law saw and talked with the client, he investigated and assisted in the preparation for trial and he observed the turning of the wheels of justice. His contact with the law was subjective as well as objective. The law was a living, vibrant part of his life. The didactic schools of law date from the middle of the last century. The student was taken out of the law office and placed in a law school where production-line methods were employed in his training much as now, except that he was taught from textbooks and lectures by men who were active in the practice and who gave part of their time to teaching in day or night schools. These teachers were not primarily educators, but they knew from daily contact "what made the wheels go around" and could impart this "know-how" to their students. Whatever may have been the pedagogical defects of this and the apprenticeship system, they did produce great leaders and great lawyers in a very vital period of American history.

Student No Longer Learns by Doing

The modern system of legal education dates from Professor Langdell and his casebook method at Harvard, and from the full-time but largely inexperienced practitioner as teacher. No longer does the student learn by doing, and his contacts with reality are further removed. He learns by study of the opinions of the courts expressed at the conclusion of the litigation. He studies the sketchy abstract of the many steps in the lawsuit by means of the court's obituary before the carcass of the case is consigned to the dead files. The casebook system may afford a more logical and chronological exposure of the student to the law, but it is of little aid to him in his practice. Is it not strange that students in their preparation for examinations either in course or for admission to the Bar almost always go to the textbooks rather than to their casebooks?

The plain truth is that we have overemphasized the case system in our methods of legal education. This fact, coupled with a predominance of nonpracticing teachers, has resulted in the law schools of America turning out half-trained lawyers who find themselves obliged to complete their education by trial and error at the expense of an unsuspecting public, or to serve a catch-as-catch-can apprenticeship in some law office. The expenses of the lawyer in maintaining his law office, his rent, books, secretarial and miscellaneous outlays are in excess of the average gross income of the lawyer of a generation ago. All but the most fortunate can scarcely expect to earn expenses for a considerable period. Now, and for some years to come, our young lawyers will be older lawyers, for their education was interrupted by from three to five years in the Armed Services. Many have married and have children. They cannot undergo a long period of "starvation" or understudy.

Few Changes in Legal Education in Last Fifty Years

The foregoing considerations present a challenge to law schools. Few, if any, changes have been made in legal education since the general adoption of the case system more than half a century ago, and none of any real remedial import are in prospect. Within the last decade or so an effort has been made in some law schools to have their students participate in law clinics or legal aid societies where they have the opportunity of making some observation of the law in action. Local bar associations in some cities where there are law schools, occasionally conduct a "Cook's Tour" of students through the courthouse, and judges show consideration to groups of students who may visit their courts while in session. All these are but palliatives for what is actually needed, and they are far from being a solution of the problem. A three-year escorted tour through a museum of the law with interesting commentaries by the curators of jurisprudence will give the better student a broad view of the field, but will not show him how to practice law.

The student of civil engineering is given a foundation of theory and principles and is not only shown the tools of his profession, but, under supervision, he is required to use them. He is required to study the classic works of construction and design, but his training does not stop at that. He must himself go to the field and to the drafting table, make his surveys and field notes and draw the plans and specifications for the structure. Excepting only the law schools, in every field of professional study in our universities today, the

doing by the student of that which is taught goes hand in hand with classroom instruction. Why should the law school be the exception? There is no sound reason for it, and there is every good reason for correction. If law school methods of education were adopted in science, the student of chemistry, physics or biology would be furnished with "casebooks" containing not a complete and detailed recital of each step in the performance of the experiments which had been performed by others but the commentary of a scientific board of review on such experiments. The student would not perform any experiments himself. There would be no laboratories with expensive equipment and supplies, for there would be no need for them. We would then say to the young "scientist": "When you finish college you can then learn for yourself how to work in a laboratory and, if you can, try to associate yourself with an older man who has had experience". That is substantially what we now say to the law graduate. Is it any wonder that men of affairs will not trust matters of importance to young lawyers regardless of the great name of the law school from which they have been graduated? Who would knowingly have a lawyer prepare his will, his contract, bring or defend him in a lawsuit, whose knowledge was limited to reading about them and whose experience in the subjects was not even synthetic?

Law Student Has Time for "Laboratory" Work

It has been said that the law student is overloaded as it is, and that his schedule will not permit him to carry any additional work, regardless of how desirable practical courses may be. The fact of the matter is, with isolated exceptions because of heavy assignments of collateral reading, the law student has more leisure than any other professional student. No, the law student is not overworked at present and could well devote the additional equivalent of the laboratory time of the science or other professional student to the performance of legal experiments complementary to his several classroom courses.

Finally, it is asserted that to inaugurate courses of practical value and provide competent experienced supervisory instructors, even if time were available, would be prohibitively expensive and require much additional space which is not available. The most drastic change, and the first that would have to be made, would be in the pedagogic approach to the teaching of law. It is not proposed that the case system be abandoned, but rather that it be combined with the performance work exactly as in the teaching of science and the other professions. The casebook teacher in each of the several subjects taught would conduct his courses substantially as at present, but would supplement them with experience or performance exercises. The one would be a complement to the other. This would impose some additional work on the present instructor but it is believed that it would not be burdensome. The space factor likewise is not prohibitive of the proposal, for the existing classrooms, library and practice court rooms are not in full economic use, and their potential would be amply sufficient until consideration can be given in future expansion of building facilities.

Director of Training Should Be Experienced

There remains the question of additional instructors and supplies. Initially this would increase the student per capita cost but there would be many nonrecurring items of expense. To establish in the law school facilities that would permit the student to meet and encounter a fair sampling of the problems of the practicing lawyer would necessarily require the addition to the faculty of a director of this new activity and such assistants as he might require. The director and, at first, his assistants should be men of both teaching and practicing experience. Later the assistants, if trained in the new system, might be graduate students. Second in importance only to a coöperative attitude on the part of the existing faculty would be the selection of the director. Qualified men are not readily available, but they can be found. The director should have had a broad experience in the practice and should not be superannuated. A minimum of fifteen years in the practice would be desirable. He should be keen, alert, a leader, and by his own conduct and professional example should set a high standard for the neophyte lawyer. He should devote his full time to this work and should have no outside professional interests. A man with the required qualifications (and none other should be considered) probably could not be obtained for less than a substantial salary unless he should prove to be the rarity of independent means who found his compensation in his contribution to legal education.

The institution of a law performance laboratory will require time and careful planing. The director should be authorized to visit and examine the effort that is being made in this direction in those few law schools where serious effort in a practical direction is being made. The Harvard School of Business Administration, through the years of its existence, has collected from alumni and others many thousands of actual business cases in which problems and their solution or failure as they actually occurred are made available for use in the assignment of similar cases to students. In like manner there can be built up similar cases and problems in the law taken from the experience of successful lawyers in every field of their activity. Model cases including complete transcripts of the pleadings and proceedings in the trial court, after judgment, briefs and appeals, can be collected and performance assignments can be made from them. Without disclosing any confidential information, good law firms large and small would be complimented by having presented not only ex-

amples of their own work, but an insight into the prudential affairs of their offices.

Students Would Learn Office Management

From these the student could have access to a most neglected subject of the practice—office management and compensation for services. Counsel for great corporations, insurance companies and the like would willingly contribute examples of the legal work of their companies. Supreme courts would aid on request, either by permitting their files to be copied or by supplying copies where available. Perhaps no other profession is more generous in this respect, and there exists for the asking a great reservoir of live material for the revitalizing of legal education. The collection and assimilation of this material for laboratory use will require time, and as new procedures and developments in the law occur constantly, it will never be completed but will be subject to revision and addition in keeping with the law as it develops and expands.

It should be remembered that this undertaking will be largely over untrod ground in legal education. It would postpone unduly its beginning to attempt to assemble all the material and prepare the entire three-year course in advance. Furthermore, if this were done, the second- and third-year students would not have had the performance work of their preceding years. Therefore, it would seem more desirable from every standpoint to begin the experiment with first-year men and add successive years as they progress through school.

The law is conservative and law schools are even more so. In our day we have witnessed the elimination of the profit and degree-mill law school, have increased the requirements for admission to the study of law and have practically excluded the part-time teacher. However, our educational methods have remained substantially unchanged for over half a century. The modern law school is composed of students with casebooks, a law library, classrooms and professors, but there is nothing approximately approaching a law office or a laboratory in which the student may learn to apply the law that he may have learned.

Some fair day there will be a law school with the courage to make an honest examination of its pedagogical conscience, admit its sin of omission and then show its purpose of amendment by doing something about it. That is the law school to which will be sent the sons of lawyers, and Jim Barrister's son will be one of them.

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